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No. 96

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether a federal court must have a federal basis for reforming local government institutions and whether any such judicial reform must be tailored to remedying only violations of federal rights.

II. When a federal court has refused to find federal liability, can that court, in purporting to reform local government institutions under local law, properly refuse to measure the scope of the remedy against local law on the ground that the local government had agreed to such relief if, and to the extent that, it was found liable under federal law.

PARTIES

This action was certified as a class action in the United States District Court for the District of Columbia. The lead plaintiff in that court, who is the lead respondent in this Court, is LaShawn A., by her next friend, Evelyn Moore. The petitioners in this Court are: Marion S. Barry, Jr., Mayor of the District of Columbia; and several subordinate District officials, Wayne Casey and Annie Goodson. Petitioners appear in this Court in their official capacities as sucessors in interest to the original defendants, all of whom were sued in their official capacities: Marion S. Barry, Jr., Peter Parham, Barbara Burke Tatum, Jean R. Hunter, and Evelyn Andrews.

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MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marion S. Barry, Jr., Mayor of the District of Columbia, and several subordinate officials of the District of Columbia, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The October 30, 1996, judgment of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-2a) is not reported. The decisions of the United States District Court for the District of Columbia dated November 12, 1993; December 13, 1993; and January 27, 1994; are not reported. App. 101a, 103a & 104a.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Following its decision, petitioners filed a timely petition for rehearing and a suggestion for rehearing *in banc*. The petition and suggestion were denied on December 13, 1996. App. 188a & 189a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.); the Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

Relevant provisions of these statutes are reproduced in a statutory appendix.

STATEMENT OF THE CASE

I. INTRODUCTION.

The protection and care of abused and neglected children have long been the special responsibilities of local government. To safeguard the interests of these children and of their parents, the states and the District of Columbia have enacted comprehensive legislation concerning child abuse and neglect, foster care, termination of parental rights, adoption, and related matters. These jurisdictions also have established specialized family courts to administer these laws.

This action was brought to have the federal judiciary reform the District of Columbia's child-welfare system. Its

stated principal aims were: (1) to secure services for families that would prevent the removal of abused and neglected children from home or that would permit them to return home and (2) if a return home were not possible, to terminate parental rights quickly to increase the possibility of adoption.

The United States District Court for the District of Columbia, the Honorable Thomas F. Hogan, ruled that the District's child-neglect and foster-care system violated numerous rights guaranteed by federal legislation and the Constitution. Based on these rulings, the parties negotiated, and he approved, a far-reaching, *but conditional*, remedial decree restructuring the system. In the decree, the District reserved the right to challenge his liability rulings and any remedy arising from those rulings.

On appeal, the United States Court of Appeals for the District of Columbia Circuit refused to decide whether federal law could support the decree. Instead, the court *sua sponte* held that Judge Hogan could and should reform the District's child-welfare system based solely on local law, *if possible*. The court did so even though it acknowledged that Judge Hogan had declined to exercise pendent jurisdiction and did not find that he had abused his discretion in refusing to decide local-law claims.

On remand, Judge Hogan re-entered the sweeping remedial decree. The District again appealed. A divided panel ruled that the first panel had seriously erred in not determining whether the decree could be supported by federal law and it remanded the case for that purpose. Plaintiffs successfully sought rehearing *in banc*. The full court ruled that the law-of-the-case and law-of-the-circuit doctrines barred reconsideration of the decision of the first panel and it remitted the case back to the second. The second panel then

affirmed. It concluded that, to the extent the sweeping remedial decree exceeds local law, the decree exceeds federal law as well, and that the District's conditional agreement to the decree, based on a federal premise to be tested on appeal, could be extended to a decree without a federal premise. There was no need therefore for the court to determine whether the decree was supported by local law.

The decision of the D.C. Circuit contravenes fundamental principles of federalism and comity. The court erred in holding that a federal court may, without any federal basis whatsoever, reform the District's child-neglect and foster-care system. The District's compliance with its own laws governing the protection of abused and neglected children is properly left to local government institutions, including its specialized family court.

The D.C. Circuit also erred in upholding the decree without measuring its scope against local law. The District's consent to the decree was expressly conditioned on affirmance of Judge Hogan's sweeping federal liability findings. A federal court acts improperly when it upholds an institutional reform decree which it recognizes is not supported by agreement (because the condition of the agreement was not satisfied) or by law (because it exceeds both federal and local law).

II. PROCEDURAL HISTORY.

A. UNITED STATES DISTRICT COURT.

This case was brought as a class action on behalf of two groups of children: (1) children about whom reports of neglect or abuse have been made and (2) abused or neglected children who enter the District's foster-care system. The

complaint alleged federal statutory and constitutional claims and pendent District-law claims. The District unsuccessfully moved to dismiss the complaint on several grounds, including abstention and failure to state a claim.

Following a bench trial, Judge Hogan ruled, on April 18, 1991, that the District's child-neglect and foster-care system violated rights guaranteed by two federal statutes, the Adoption Assistance and Child Welfare Act of 1980[1/] and the Child Abuse Prevention and Treatment Act,[2/] and that these rights are enforceable pursuant to 42 U.S.C. § 1983. In addition, he ruled that the system violated the substantive and procedural components of the Due Process Clause of the Fifth Amendment. The procedural due process ruling was based on the theory that two District statutes and an internal operating manual developed by its child-welfare agency, the Department of Human Services ("DHS") create liberty interests within the meaning of the Due Process Clause. App. 3a-82a.[3/]

1. Findings of Fact. Judge Hogan found that the District violated the federal statutory rights of children who are reported to be abused or neglected but who are not in the District's foster-care system. First, DHS failed to initiate prompt investigations of reports of neglect. App. 21a-24a.

[1/]94 Stat. 500, codified in Title IV-B of the Social Security Act, 42 U.S.C. §§ 620-627, and in Title IV-E, §§ 670-679.

[2/]88 Stat. 4 (1974), 42 U.S.C. §§ 5101-5106, as added 102 Stat. 110 (1988), and renumbered 103 Stat. 764 (1989), 42 U.S.C. § 5106a.

[3/]The two local statutes were the Prevention of Child Abuse and Neglect Act of 1977), D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

Second, DHS failed to provide services "to enable children to remain with their families or reunite with them if temporary placement is required" in violation of the "reasonable efforts" plan requirement of the federal Adoption Assistance Act, 42 U.S.C. § 671(15). App. 25a. In addition, as a predicate for his constitutional rulings, Judge Hogan ruled that this conduct violated District law. App. 21a-25a.

Judge Hogan also found that the District violated the federal statutory rights of children in foster care. For example, DHS permitted children voluntarily committed to its custody by their parent(s) to remain in that status for too long. App. 26a. In addition, children were not placed in the "least restrictive" placement. App. 27a.

Finally, and again as a predicate for his constitutional rulings, Judge Hogan found that DHS was violating local law and agency policy by failing to "'prepare a permanent plan'" for the placement of children who cannot be returned home within a reasonable time. App. 34a. DHS was not expeditiously seeking to terminate parental rights or referring children who had been freed for adoption to its Adoption and Placement Resources Branch. App. 35a.

2. Legal Rulings. Judge Hogan based liability solely on violations of federal rights. He ruled that 42 U.S.C. § 1983 is available to enforce both the federal Adoption Assistance Act and the Abuse Prevention Act. App. 61a-64a. In so ruling, he rejected the District's argument that "the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights . . .." App. 62a.

Despite his federal statutory rulings, Judge Hogan found it necessary to determine whether the District's actions violated the Constitution. A constitutional ruling was neces-

sary, he explained, because, if the District decided to forego federal funding, "the Court would have *no basis* for enforcing any injunction it might order." App. 66a (emphasis added).

On the constitutional issues, Judge Hogan ruled that "plaintiffs have a liberty interest in safe conditions" arising from the substantive component of the Due Process Clause (App. 70a) and more specifically, "a right to reasonably safe placements in which they will not be harmed." App. 71a. "This right," moreover, "extends to safety from psychological and emotional harm." App. 71a. He also ruled that plaintiffs have a liberty interest in services: "To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, . . . the children have a constitutional liberty interest in those services." App. 72a.

In addition, Judge Hogan ruled that the District's own statutes and DHS's internal operating manual create constitutionally protected interests because they provide specific standards for safeguarding children who are reported to be neglected or abused or who are in the District's foster-care system. App. 72a-74a.

Finally, Judge Hogan ruled that the District had violated plaintiffs' liberty interests in freedom from harm: "The facts . . . establish beyond any doubt that defendants have failed to protect these plaintiffs from harm -- whether physical, psychological, or emotional -- by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things." App. 78a.

The parties then negotiated an 84-page remedial decree ("Final Order") conforming to the court's sweeping federal

liability rulings. This detailed decree regulated every aspect of the District's child-neglect and foster-care system (*e.g.*, protective services, services to families, placement of children, planning, adoption, caseloads, staffing, worker qualifications, training, resource development, contract review, information systems, financial development).[4/] In this decree, the District expressly reserved the right to appeal the court's federal liability rulings and the parties agreed that the decree would be "null and void" to the extent that these rulings did not withstand appellate review. See App. 201a. Judge Hogan approved the Final Order on August 27, 1991. App. 83a.

B. The Court of Appeals -- *LaShawn I.*

A panel of the D.C. Circuit affirmed the judgment. First, it ruled that *Younger* abstention,[5/] as expanded in *Moore v. Sims*, 442 U.S. 415 (1979), did not require Judge Hogan to abstain from deciding the constitutional claims of children who are parties to local family-court neglect and adoption proceedings. App. 87a-92a.

Nevertheless, the panel refused to decide the merits of what it regarded as "the complex constitutional and federal statutory issues in this case," including the District's argument that this Court's intervening decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), required reversal of the ruling that the federal statutes relied on by plaintiffs were privately enforceable. App. 92a. It was unnecessary to reach these issues because, according to the panel, "[t]he District of Columbia's statutes and regulations provide a scheme for the protection

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[4/] Twelve copies of this decree have been lodged with the Clerk's Office of this Court. See also App. 190a-201a.

[5/] *Younger v. Harris*, 401 U.S. 37 (1971).

and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction." App. 92a. The panel exercised pendent jurisdiction *sua sponte* and without finding that Judge Hogan had abused his discretion in declining to do so. Citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the panel announced, without any analysis, that "[o]ur authority to decide the case entirely on pendent state grounds is incontrovertible." App. 96a. Thus, although unwilling to resolve the District's *Suter* challenge to Judge Hogan's federal statutory rulings, the panel seized the opportunity to rule -- erroneously -- that the District's child-neglect and foster-care laws are enforceable in private actions. App. 93a-96a.

Insofar as the remedial decree is concerned, the panel ordered Judge Hogan to re-enter it based on local-law, "if possible." App. 97a. The panel did so without considering that it had been negotiated on the basis of sweeping federal liability rulings -- rulings the panel had declined to affirm -- and without ruling on the legal significance of the District's reservation-of-rights clause. The panel did caution that the decree could not be re-entered to the extent that Judge Hogan found, on remand, that the decree did not have either a local-law basis or, after *Suter*, a federal statutory basis. App. 96a-97a. The panel did not authorize Judge Hogan to revisit his constitutional rulings.[6/]

[6/]The panel's implicit ruling that plaintiffs' constitutional claims were insubstantial is sound. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). Despite the flaws in the District's child-welfare system set forth in Judge Hogan's opinion, that opinion does not set forth findings of fact or evidence that approximate the allegations that have persuaded other federal courts to find a potential due process violation. *See, e.g., Yvonne L. ex rel. Lewis v. New Mexico Dep't*

(continued...)

The District unsuccessfully sought rehearing. Two judges (Buckley & Williams, JJ.) would have granted the suggestion for rehearing *en banc* to certify to the District of Columbia Court of Appeals whether District "law provides a private right of action . . .." App. 100a. This Court then declined review. *Kelly v. LaShawn A.*, 510 U.S. 1044 (1994).

C. THE REMAND.

On remand, Judge Hogan rejected the District's argument that the reservation-of-rights clause in the remedial decree required dissolution of the decree because its federal premise had, in effect, been vacated on appeal. App. 101a-102a. In his view, his opinion had been "affirmed." App. 101a. In addition, despite the D.C. Circuit's directive that he measure the decree against local law, he ruled that "*the Court deems it a necessary and appropriate use of its equitable authority to order a remedy which exceeds the specific mandates of local law.*" App. 104a (emphasis added). He thus re-entered the decree, deleting citations to federal law.[7]

The District again appealed.

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[6](...continued)
of Human Services, 959 F.2d 883, 893 (10th Cir. 1992) (foster-care child who was allegedly raped in foster-care facility has constitutional cause of action if she can establish that officials placed her in facility either knowing or suspecting that it was dangerous); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (Posner, J.) (placement of child with foster parent known to be, or suspected of being, a child abuser violates due process, but seemingly mindless shuttle of child from one foster home to another does not).

[7]Twelve copies of the revised decree have been lodged with the Clerk's Office of this Court. Excerpts are set forth in App. 190a-201a.

D. THE COURT OF APPEALS -- *LASHAWN II*.

1. The Panel Decision of October 31, 1995.

A divided panel reversed. In a thoughtful decision, the panel majority (Williams & Henderson, JJ.) ruled that a federal court does not have "jurisdiction to enforce a wide-ranging institutional reform order against the government of the District of Columbia based entirely on District of Columbia law." App. 108a. It took "seriously" this Court's statement that "'the issue whether pendent jurisdiction has properly been assumed . . . remains open throughout the litigation.'" App. 130a, quoting *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 727. This Court's decision in *Suter v. Artist M.*, *supra*, had "flatly remove[d] some of the supports of pendent jurisdiction, and, at a minimum enfeeble[d] most of the others . . .." App. 130a.

The panel majority remanded for reconsideration of the existence of any federal statutory claim and the District's reservation-of-rights clause. It ruled that "since the provisions of the consent decree were negotiated as responses to specific findings of violations, the parties clearly anticipated that any undermining of those findings would require that the District be freed of the affected provisions." App. 125a.

2. The *In Banc* Decision of July 9, 1996.

Plaintiffs successfully sought rehearing *in banc*. The full court ruled that the *LaShawn II* panel had violated the law-of-the-case and law-of-the-circuit doctrines. App. 156a-170a. It returned the case to the panel for further consideration.

Judge Silberman concurred. App. 171a-172a. He did not think it was "clear error for the original panel to have pretermitted the federal statutory and constitutional questions . . .." App. 171a. Nevertheless, the decision to exercise pendent jurisdiction was "dubious" because the court traditionally has treated the District like a state. App. 171a. Under *Gibbs* and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the *LaShawn I* panel should have decided "the federal questions first so that if they were decided against the plaintiffs, the case should be dismissed." App. 171a. Judge Silberman concluded: "If home rule is to be abolished . . ., it should be done by Congress, not incrementally by federal judges." App. 172a.

Judges Williams and Henderson, reiterating the *LaShawn II* majority opinion, dissented. App. 173a-187a.

3. The Panel Decision of October 30, 1996.

The *LaShawn II* panel, in its second decision, disposed of the District's appeal in an unpublished order. First, it acknowledged that the District's consent to the remedial decree was "to be sure . . . conditioned on affirmance of the district court judgment on federal grounds." App. 2a. But that express condition was now irrelevant because the decree "does not extend beyond District law more than it extends beyond federal law." App. 2a. In other words, because the District had agreed to a remedial decree based on what it considered to be false federal premises to be challenged on appeal, including a ruling that local law and DHS's internal operating manual created constitutional liberty interests, the

District could be judicially bound to the decree based on false local-law premises.[8/]

III. DISTRICT LAW GOVERNING ABUSED OR NEGLECTED CHILDREN, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, AND ADOPTION.

The District of Columbia, like each of the states, has a comprehensive statutory framework governing the identification and protection of abused or neglected children, foster-care arrangements for such children, termination of parental rights, and adoption. Like each of the states, it also has a specialized family-court system for administering these laws. The District's system became a purely local system in 1970 when Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970.[9/] In the Court Reform Act, Congress created an independent local court system for the District and conferred on the Family Division of the District of Columbia Superior Court "exclusive jurisdiction" of neglect and adoption proceedings. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

The District's Abuse and Neglect Act provides that its Department of Human Services ("DHS") shall investigate within 24 hours reports of neglected children and that the Metropolitan Police Department shall "immediately" investi-

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[8/]Thus, although Judge Hogan had invoked what he believed to be his "equitable authority" in re-entering the decree, the *LaShawn II* panel, in its second decision, wrote that it "infer[red] that the district court reasoned that the substitution of District law alone as the basis of the decree, in place of reliance on federal plus District law, did not materially undermine the District's consent." App. 2a.

[9/]Pub. L. 91-358, 84 Stat. 473, now codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 *et seq.* (1989 repl.).

gate reports of abused children. D.C. Code §§ 6-2102(b) & 6-2103(c). In these investigations, a preliminary determination is made whether a child should be removed from his home or whether the child "can be protected by the provision of services or resources." D.C. Code § 6-2105(a) & (b).

D.C. Code § 16-2301 *et seq.*, governs judicial protection of children believed to be abused or neglected. The Family Division oversees every important decision concerning such children -- *e.g.*, whether, in fact, they have been abused or neglected and, if so, how they should be cared for. D.C. Code §§ 16-2312, 16-2313, 16-2317, 16-2320, 16-2322, 16-2323. It conducts evidentiary hearings on each of these matters after notice to all interested parties. D.C. Code §§ 16-2312, 16-2317, 16-2320. In these proceedings, a child is entitled to counsel, who is compensated by the District, as are his parent(s), if they cannot afford counsel. *Id.* The decisions issued by the Family Division are required to be "in the best interest of the child . . .." D.C. Code § 16-2320(a).

The Family Division periodically reviews dispositional orders. D.C. Code § 16-2323(a). At these hearings, it considers the extent to which a parent(s) has visited his or her child; whether and when a child may be returned home; and whether DHS intends to seek termination of parental rights and, if not, why not. D.C. Code § 16-2323(b).

District law also governs termination of parental rights and adoption, D.C. Code §§ 16-2351 to -2365. These provisions are intended to "encourage stability in the lives" of children by terminating the rights of parents who are no longer capable of caring for them, "ensure that the constitutional rights of all parties are recognized and enforced," and "increase opportunities for the prompt adoptive placement of children for whom parental rights have been terminated."

D.C. Code § 16-2351(a)(1), (2) & (3). To accomplish these goals, parties to a proceeding to terminate parental rights must include the child, his parent(s), and the agency having custody of the child. D.C. Code § 16-2356. In addition, in the case of a child who has been adjudicated abused or neglected and committed to the District's custody for more than 18 months and for whom no hearing on a motion to terminate parental rights has been held within the preceding 12 months, the law provides that the Family Division shall hold a review hearing to determine why a motion to terminate the parent-child relationship has not been filed; such hearings are thereafter held annually if necessary. D.C. Code § 16-2355(a) & (b).

If parental rights are terminated, the District assumes legal custody of the child and attempts to place the child permanently. D.C. Code § 16-2360. If an adoptive placement is not made within six months, the Family Division monitors the District's efforts and has the power to order such a placement. D.C. Code § 16-2360(b).

REASONS FOR GRANTING THE WRIT

This case concerns fundamental questions of federalism and comity that are of great importance to local governments and to the people they represent and serve. The D.C. Circuit has held that a federal court has the power to reform local government institutions without a federal basis and that the scope of its power need not be measured against *any* law.

Furthermore, the D.C. Circuit has issued this ruling in an area of central importance to local governments. It has ruled that a federal court has the "incontrovertible" power to reform local child-welfare agencies based solely on its interpretation of local law. The D.C. Circuit so ruled even though many of the claims here constitute the very *raison d'etre* of

family-law courts -- whether children have been abused or neglected; whether they should be removed from their homes, and, if so, where they should be placed in foster care; whether the rights of their parents should be terminated; and adoption.

The D.C. Circuit's pendent-jurisdiction decision disregards the principles of federalism and comity underlying this Court's jurisprudence and is at odds with the decisions of other Circuits. In addition, its decision to uphold the remedial decree without measuring the scope of the decree against the violation of *any* law, federal or local, is also fundamentally flawed. These decisions conflict with the principles set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *Lewis v. Casey*, 116 S. Ct. 2174 (1996); and other decisions of this Court. Under this Court's decisions, federal courts should not entertain pendent claims against local governments in institutional reform litigation. In addition, this Court has ruled that federal courts have an obligation to ensure that institutional reform decrees are tailored to violations of law and that they do not usurp the legitimate functions of the political branches.

The D.C. Circuit, however, has ruled that massive relief can be ordered against the District, without a federal basis and with only a theoretical local-law basis, and that it may do so in family-law matters that have been entrusted by Congress to the District's legislative, executive, and judicial branches. The D.C. Circuit issued this ruling, moreover, without even certifying to the highest court of the District of Columbia several critical issues, such as whether District law creates private rights of action. Its rulings disregard settled local law and erroneously resolve unsettled local-law issues. In addition, the D.C. Circuit refused to eliminate from the decree measures that admittedly exceed local law. It did so

on the ground that, since the District conditionally agreed to a decree that purported to cure federal-law violations and reserved its right to challenge federal liability, and since, as it turned out, the decree exceeds federal law -- which was the District's point all along -- the District's conditional agreement was somehow transformed into an agreement to comply with a remedial decree that exceeds any and all legal requirements.

A federal court simply has no business attempting to reform local child-welfare institutions because it believes there may be a local-law basis for doing so. A federal court, in contrast to a local family-law court, has no expertise in child-custody matters; has no authority to terminate parental rights or to approve adoptions; and does not have before it the parents of children who have a constitutionally protected interest in their children. A federal court also has no business reforming local government institutions, over their objection or even with their consent, without determining that there is a legal basis for such reform. The rulings here therefore constitute a serious intrusion into family-law matters that are properly the province of local government institutions.[10/]

I. THE D.C. CIRCUIT'S DECISION THAT A FEDERAL COURT MAY REFORM LOCAL GOVERNMENT INSTITUTIONS WITHOUT A FEDERAL BASIS RAISES IMPORTANT QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT.

This Court has not expressly decided whether a federal court must have a federal basis for reforming local govern-

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[10/]The D.C. Circuit is not alone. See National Center for Youth Law, "Foster Care Reform Litigation Docket" (1993) (collecting numerous federal court child-neglect and foster-care cases in 16 states).

ment institutions and whether such judicial reform efforts must be limited to redressing federal rights. This Court's decisions, however, compel the conclusion that there are such limitations. Local government institutions, and the people they represent and serve, have a weighty and urgent interest in ensuring that their proper political powers are respected by federal courts. In addition, the Circuits have taken conflicting approaches in resolving these issues.

A. THIS COURT'S JURISPRUDENCE.

In *United Mine Workers of America v. Gibbs*, *supra*, this Court, in an action for damages involving only private litigants, ruled that a federal court may exercise pendent jurisdiction so long as a case contains a substantial federal question and the federal and nonfederal claims arise out of a common nucleus of operative fact. At the same time, however, it cautioned that:

> pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . .. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

383 U.S. at 726.

In *Pennhurst*, this Court significantly limited *Gibbs*. It held that the 11th Amendment to the Constitution precludes federal courts from reforming state institutions based on state

law. As a consequence, a federal court may act only if it has a federal basis and it is limited to redressing federal rights. And, as this Court recently ruled in *Lewis v. Casey*, *supra*, even in the case of constitutional violations, a federal court has an obligation to ensure that any remedial decree is tailored to redressing those violations and that it respect the legitimate exercise of power by the political branches.

If the District of Columbia were a state, *Pennhurst* would plainly prohibit a federal court from exercising pendent jurisdiction in this case. For the reasons that follow, the fact that the District, like any other municipality, is not a state does not mean that a federal court has the power to reform its local government institutions beyond federal-law requirements.

This Court has made clear that even when federal judicial power is at its zenith -- where state and local governments have violated constitutional rights -- considerations of comity and federalism constrain a federal court's equitable power to reform state and local government institutions as a remedy. Furthermore, in such cases, this Court has not differentiated between a federal court's proper exercise of power over state governments and over local governments.

Thus, in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court ruled that the principles of federalism and comity extend to government entities, there a county, which do not have the protection of the 11th Amendment. There, the Court admonished that "[f]ederal courts may not order States *or local governments*, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." *Id.* at 389 (emphasis added). *See also Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (invalidating federal court's imposition of a tax increase against a local school district as a remedy for unconsti-

tutional school segregation because "the tax increase contravened the principles of comity that must govern the exercise of" a federal court's "equitable discretion"); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (Even in the case of federal constitutional violations, "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."); *Milliken v. Bradley*, 418 U.S. 717, 741-45 (1974) (in remedying unconstitutional school segregation, a federal court must have a federal reason for disregarding the political authority and autonomy of local school districts and the citizens residing within them).

If, as this Court has ruled, there are constraints on a federal court's equitable power to reform local government institutions in order to redress *constitutional violations*, it follows *a fortiori* that there must be constraints on a federal court's equitable power to reform local government institutions to redress *violations of state or local law*. Indeed, given that the federal interest in the latter case is at its nadir, a federal court's authority should be sharply constrained. Except in the rarest of cases, a federal court should be required to find a federal basis for any such institutional reform and to limit its exercise of authority to the redress of federal claims. A federal court should not be permitted to exercise pendent jurisdiction to reform local government institutions based on state or local law.

A ruling that a federal court must limit itself to a federal basis in reforming local government institutions would advance important policies. It would help to ensure that federal courts do not improperly displace democratic processes and institutions. It would help to ensure fairness to litigants by reserving to state and local courts resolution of state- and local-law issues. And it would conserve scarce federal judi-

cial resources by prohibiting them from being diverted to cases that should be heard in nonfederal fora. In the context of this case -- difficult child-custody and related decisions traditionally within the purview of specialized family-law courts and involving litigants who are parties to proceedings in such courts -- these policies apply with especial force.

As this Court explained in *Ackenbrandt v. Richards*, 504 U.S. 689, 703 (1992), there are "sound policy" reasons for federal courts to refrain from deciding local-law issues in child-welfare cases -- reasons that are strong enough to support the judicially created domestic relations exception to the diversity jurisdiction of the federal courts. Among other matters, "[i]ssuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance." *Id.* at 703-04. Furthermore, "[a]s a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over . . . child custody decrees." *Id.* at 704. Finally, "as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees." *Id.* at 704. *See also Moore v. Sims*, 442 U.S. 415 (1979) (to avoid displacement of state family-law courts, federal courts should abstain from deciding constitutional challenges to state child abuse-and-neglect systems when the federal plaintiffs have an opportunity to raise these challenges in state proceedings to which they also are parties).

The D.C. Circuit's ruling here violates the federalism and comity principles underlying this jurisprudence. Here, the

D.C. Circuit plunged itself into the thicket of District child-welfare policy and family law. These are quintessentially local matters, even more than public schools and nonfederal prison facilities, as this Court has recognized in implying an exception to a federal court's diversity jurisdiction in family-law matters and in ruling that federal courts must abstain from deciding constitutional issues arising from such matters when litigants may have these issues resolved in family-law courts. The D.C. Circuit has authorized federal regulation of the District's child-welfare system without any federal basis and it has done so even though Congress has committed to local government institutions local-law authority to act in this area.

Concomitantly, the D.C. Circuit, after refusing to decide whether there is a federal basis for the decree, then refused to measure the scope of the decree against local-law requirements even as it acknowledged that the decree exceeds local law, as well as federal law. As a consequence, Judge Hogan now sets child-welfare policy for the District, manages its child-welfare agency, and intrudes on the authority of the Family Division of the Superior Court. He sits as a combined local legislature, executive, and family-law court.

B. THE DECISIONS OF OTHER CIRCUITS.

The D.C. Circuit's decision in this case is sharply at odds with the approach taken by other federal appellate courts. These courts have declined to reform local government institutions without a federal basis and have recognized the primacy of family-law courts in family-law matters even in cases in which there is a federal interest.

The Seventh Circuit has held that a remedial order, which had been negotiated following a determination that a municipality was violating the Constitution, had to be dis-

solved when the federal predicate was overturned. In so holding, a plurality of the court, citing *Rufo*, explained that a federal court may not "require a unit of state or local government to abide by a consent decree that does not serve any federal interest," and that, without a federal basis, a federal court may not "intrude[] on the internal operations of [a] . . . City, telling the Mayor what items must be in the annual budget." *Evans v. City of Chicago*, 10 F.3d 474, 475 & 476 (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994). *Compare Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996) (in litigation challenging constitutionality of state prison disciplinary proceedings, consent decree did not violate 11th Amendment by providing that permissible standards be set by reference to state law and contrasting that situation with one in which plaintiff "'relies on state law as the foundation for relief'").

The Eighth Circuit, in turn, has ruled that, in light of *Rufo* and *Suter*, Arkansas was entitled to request modification of a consent decree regulating its child-neglect and foster-care system. *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). In so ruling, the court explained:

> Federal courts have interests independent of those of the states in preserving the appropriate relation between sovereigns and in efficiently allocating scarce federal resources to the adjudication of federal claims. . . . As *Pennhurst* makes clear, a federal court's interest in remedying violations of state law is decidedly minor, so that *expending significant federal judicial resources enforcing consent decree provisions that concern only issues of state law is rarely justifiable.*

> And consent decrees entered in institutional reform litigation "reach beyond the parties involved directly in the suit and impact on the public's right to sound and efficient operation of its institutions." . . . Therefore, the manner in which [state law] . . . is to be enforced by a court of equity "must be structured to take into account 'the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.'"

999 F.2d at 325-26 (emphasis added). *See also Alexander v. Britt*, 89 F.3d 194, 200 (4th Cir. 1996) (observing, in a case in which state and local officials had violated federal statutory rights, that while "in a consent decree, defendants may agree, within limits, to do more than a judicially imposed injunction could have required . . ., [a] consent decree must, of course, still relate to an alleged violation of federal law . . .."); *Sweeton v. Brown*, 27 F.3d 1162, 1165 (6th Cir. 1994) (*en banc*) (consent decree against state prison officials should be dissolved when there was no longer a federal basis for decree even though state officials "may have been required to follow their own procedural statutes and regulations . . . as amplified in the consent decree as a matter of *state* law") (emphasis supplied by court), *cert. denied sub nom. Sweeton v. McGinnis*, 115 S. Ct. 1118 (1995); *Saahir v. Estelle*, 47 F.3d 758, 761 & 762 (5th Cir. 1995) (ruling that a federal court has no jurisdiction to enforce provision of consent decree "not . . . required by any federal or constitutional law" and explaining that "just as the scope of [a] consent decree does not enlarge the court's jurisdiction, the way the parties agreed to implement the remedy contained in the consent decree likewise cannot affect the jurisdictional bounds of the federal courts"); *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980) (dis-

missing claim that child had a constitutional right to remain in the United States following parents' divorce and mother's return to Norway as not ripe in view of child custody proceedings in state court); and *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (federal court should abstain from deciding whether grandmother had constitutional right to familial relationship with her grandchildren, who came to this country from Vietnam during "Operation Babylift," in deference to family-law court proceedings involving grandchildren).

The foregoing cases stand in sharp contrast to the decision here. They require federal courts to have a federal basis for restructuring local government institutions and limit federal courts to remedying the violation of federal rights. Furthermore, they show proper deference to the primacy of family-law courts in family-law matters even in cases in which there is a federal interest. Here, the D.C. Circuit *sua sponte* exercised pendent jurisdiction and it approved sweeping reform of a major District institution based on its preliminary and unauthoritative understanding of local law and without any consideration that Congress has reposed the authority to act in child abuse and neglect matters on local government institutions. It then refused to invalidate the decree insofar as it exceeded both local and federal law.

C. THE D.C. CIRCUIT'S JUSTIFICATIONS.

The D.C. Circuit stated that it would exercise pendent jurisdiction to avoid deciding complex constitutional and federal statutory issues. Neither justification withstands scrutiny.

First, the proposition that a federal court should decide pendent claims to avoid construing what it believes are complex federal statutes is a novel and startling principle. Fur-

thermore, as the initial decision of the *LaShawn II* panel majority made clear, the issues of federal statutory construction were no longer complex at the time of the *LaShawn I* decision, given this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992). In *Suter*, which was issued just after the District took its first appeal, this Court held that the federal Adoption Assistance Act "does not create an enforceable right on behalf" of children either under the statute itself or within the meaning of 42 U.S.C. § 1983. *Id.* at 350. Subsequently, the D.C. Circuit, citing *Suter*, has held that the other federal statute relied on by plaintiffs here is not enforceable pursuant to 42 U.S.C. § 1983. *See Doe by Fein v. District of Columbia*, 93 F.3d 861, 865-67 (D.C. Cir. 1996).

Second, insofar as plaintiffs' constitutional claims are concerned (*e.g.*, a right to services that would permit a child to remain in his or her home; a right to be adopted), the D.C. Circuit could have avoided deciding them, in the case of children who are parties to Family Division proceedings, by abstaining pursuant to *Moore v. Sims, supra.* A Family Division judge could not and would not conclude that a placement which violates a child's constitutional rights is in that child's best interests. In the alternative, the D.C. Circuit could have decided the constitutional claims, and had they been found wanting, as the District urged, it could have dismissed the case. This alternative is supported by the sound policy reasons set forth in *Pennhurst* that make it incumbent upon a federal court, in institutional reform litigation against a state, to decide constitutional claims rather than exercise pendent jurisdiction. See 465 U.S. at 121-22 & n.32.

II. THIS CASE ILLUSTRATES WHY THIS COURT SHOULD HOLD THAT A FEDERAL COURT MUST HAVE A FEDERAL BASIS FOR REFORMING LOCAL GOVERNMENT INSTITUTIONS AND MUST LIMIT ITSELF TO REDRESSING VIOLATIONS OF FEDERAL RIGHTS.

This case vividly illustrates why deference to the principles of federalism and comity is important to ensure that federal courts do not improperly displace legitimate democratic processes and local government institutions. The local-law route was, and continues to be, seriously flawed.

1. It violates the Court Reform Act in which Congress vested "exclusive jurisdiction" of neglect and adoption proceedings in the Family Division. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

2. It misreads the Youth Residential Facilities Licensure Act of 1986. The mandamus provision (D.C. Code § 3-808(d)(1)) cited by the *LaShawn I* court (App. 95a) is qualified by § 3-808(d)(2): "Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice . . . before the action is filed in court." Statutory notice, a condition precedent to bringing this action, was not given here. *See Campbell v. District of Columbia*, 568 A.2d 1076 (D.C. 1990).

3. It misreads *Turner v. District of Columbia,* 532 A.2d 662 (D.C. 1987). In *Turner*, the District's highest court merely held, in a ruling it characterized as "exceptional," that the District's Abuse and Neglect Act creates a special relationship between the District and a child reported to be abused and thus precludes the District from raising the public duty doctrine as a bar to a tort claim otherwise cognizable under

the common law. *Id.* at 675 n.11. A federal court acts improperly in construing such a decision as a mandate for judicial reform of local government institutions. *See Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 919-23 (D.C. Cir. 1996) (district court abused its discretion in exercising pendent jurisdiction in prison reform case and in inferring from local-law decisions allowing damages actions judicial power to issue injunctive relief reforming penal institutions), *petition for a writ of certiorari pending*, No. 96-1280 (filed Feb. 12, 1997).

4. It is based on a false premise that an unpublished internal agency operating manual constitutes District law. *Compare* App. 92a *with* D.C. Code § 1-1538(b) (1992 repl.).

Furthermore, events subsequent to *LaShawn I* have exacerbated matters. The remedial decree was re-entered virtually without alteration even though many of its provisions cannot possibly be "based on" District law as *LaShawn I* directed. Indeed, Judge Hogan expressly invoked his "equitable powers" to impose on the District requirements that admittedly exceed local law. In so doing, Judge Hogan displaced the Mayor's lawful local-law authority to establish child-welfare policy and to allocate scarce resources, subject to the oversight of Congress, the Council of the District of Columbia, and the Family Division of the Superior Court; and he also intruded into the functions of the Family Division. See App. 195a (remedial decree authorizes expert to decide services and plans for named plaintiffs); App. 198a (remedial decree establishes 42-day maximum limit for children in voluntary care in contrast to 90-day renewable limit permitted by District law, D.C. Code § 6-2124(c)(1)); App. 200a (Mayor to arrange with Family Division for implementation of a process to ensure that Family Division conducts hearings required by decree).

More recently, Judge Hogan has appointed a general receiver to implement the decree and thus has further encroached on the legitimate powers of the Mayor. See Docket Entries Nos. 366 & 367 (D.D.C. May 22, 1995). In addition, he has authorized the receiver to ignore District procurement and other laws, and he has set aside lawful Council legislation.[11/] In short, the decree, which is now supposed to be "based on" District law, has resulted in federal judicial intrusion into every branch of the District government.

CONCLUSION

The District is acutely aware that its child-neglect and foster-care system must be improved to ensure the well-being of its most vulnerable children. However, a federal court may not assume the roles of local legislature, executive, and judiciary in the apparent belief that it can do a better job than the combined forces of the District of Columbia government in establishing wise policies for the care of abused and neglected children, in allocating scarce resources, and in interpreting and enforcing local law. Before a federal court embarks on a journey into one of the central functions of a local government, it ought to have a federal reason for doing so; its journey should be limited to its federal concerns; and it should not intrude into areas in which local courts are exercising their authority. Nor can a federal court impose on a local government a remedial decree in which an essential condition of the decree -- federal liability -- has not been found. That decree is null and void unless the court finds a proper basis of liability and tailors the decree accordingly.

[11/] Judge Hogan refused to give effect to emergency financial measures enacted by the Council, which mandated salary reductions for most District employees, as well as periodic reductions-in-force (*e.g.*, one day each month), insofar as the measures apply to DHS child-welfare employees.

This Court should therefore review the decision of the D.C. Circuit. This Court should rule that any federal-court decree reforming and regulating local government institutions, especially those administering child-neglect and foster-care systems, must have a federal basis and be limited in scope to curing violations of federal rights.[12/]

Respectfully submitted,

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[12/]There is one other consideration. One result of the D.C. Circuit's decision may be to require the financially pressed District to pay attorney's fees to plaintiffs' counsel for this entire litigation even though plaintiffs have prevailed (mistakenly) only on local-law grounds. This potential fee award, and future potential fee awards for monitoring the remedial decree, are also compelling reasons for this Court to review the decision below.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 96-

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Statutory Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

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Statutory Appendix to
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for the District of Columbia Circuit

TITLE 3

CHAPTER 8. YOUTH RESIDENTIAL FACILITIES LICENSURES.

D.C. Code § 3-801. Definitions.

For the purposes of this chapter, the term:

* * *

(3) "Court" means the Superior Court of the District of Columbia. . . .

D.C. Code § 3-808. Enforcement and penalties.

* * *

(d) (1) Notwithstanding the availability of any other remedy, a resident, any person acting on or in behalf of a resident, or the licensee or administrator of a facility may bring an action in court for mandamus to order the Mayor, a District government agency, or the youth residential monitoring committee to comply with this chapter, a rule issued pursuant to this chapter, or any other District law relevant to the operation of the facility or the care of its residents.

(2) Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice (excluding Saturdays, Sundays, and legal holidays) before the action is filed in court.

TITLE 6

CHAPTER 21. CHILD ABUSE AND NEGLECT.

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Subchapter I. Reporting Abuse and Neglect.

D.C. Code § 6-2101. Definitions.

For the purposes of this act:

* * *

(3) Except where used in Title IV of this act, "Division" means the Child Protective Services Division of the District of Columbia Department of Human Services.

* * *

(5) "Police" means the Metropolitan Police Department of the District of Columbia.

(6) "Report" means a report to the police or the Division of a suspected or known neglected child.

* * *

(8) "Supported report" means a report, made pursuant to § 2-1353, which is supported by credible evidence.

(9) "Unsupported report" means a report, made pursuant to § 2-1353, which is not supported by credible evidence.

D.C. Code § 6-2102. Handling of reports — By Division.

(a) Upon the receipt of an oral report, the Division shall immediately inform the police of the contents of the report, if it alleges a child is or may have been an abused child.

(b) The Division shall commence an investigation of all reports alleging neglect other than abuse within 24 hours of the receipt of the report except that when:

(1) A report alleges that a child is left alone or with inadequate supervision, the Division shall commence an investigation immediately. If the Division is unable to dispatch a worker to the child forthwith, it shall inform the police of the report;

(2) A report indicates the existence of an immediate danger to a child and the immediate removal of the child from his or her surroundings appears necessary despite the available resources, the Division shall inform the police of the contents of the report and request the police to investigate. The Division shall immediately commence a social investigation. . . .

D.C. Code § 6-2103. Same — By police.

* * *

(c) The police shall immediately after a report is received commence an investigation of the circumstances alleged in the report. . . .

D.C. Code § 6-2105. Removal of children.

(a) In cases in which a child is alleged to be a neglected, but not an abused, child the Division shall determine whether the child should be removed from the home or can be protected by the provision of services or resources. If in the opinion of the Division the available services or resources are insufficient to protect the child and there is insufficient time to petition for removal, the Division shall request the police to remove the child pursuant to §16-2309 (3) or (4).

(b) In all cases for which the police are responsible for the initial investigation but which do not involve an immediate danger to a child, the police shall seek from the Division and the Division shall provide assistance in the determination of whether the child can be protected by the provision of services or resources or whether removal is necessary. Whenever possible the Division shall dispatch a worker to the scene to provide assistance in this determination. . . .

Subchapter III. Child Protective Services Division.

D.C. Code § 6-2121. Establishment and purposes.

(a) There shall be maintained within the Department of Human Services a separate and distinct Division. The Division shall have as its purposes and functions:

(1) Safeguarding the rights and protecting the welfare of children whose parents are unable to do so;

(2) Offering highly specialized diagnostic and treatment services to families when there is specific harm to the child's physical or emotional well-being;

(3) Ensuring that neglected and abused children are protected from further experiences and conditions detrimental to their healthy growth and development; and

(4) Providing services on behalf of the child designed to help parents recognize and remedy the conditions harmful to the child and to fulfill their parental roles more adequately.

(b) The Division shall have no other function which is not directly related to its child protective service purpose, except

that the 24-hour intake unit may on an emergency basis, after normal office hours, offer crisis assistance to adults.

(c) The Department of Human Services shall support the purpose and function of the Division by obtaining substitute care for a child whose parents are unable, even with available help, to meet the child's minimum needs and, where appropriate, by providing to the family of such child services which are aimed at reuniting the family as quickly as possible.

D.C. Code § 6-2123. Duties and responsibilites.

(a) The Chief of the Division shall have the following duties and responsibilities, any of which may be contracted for with private or other public agencies:

(1) To receive and investigate reports of neglect as provided in § 103 of this act, and §§ 6-2102 and 6-2104 and to assist in the determination of the need for the removal of an abused child as provided in § 6-2105;

(2) Within 90 days of taking a child into custody pursuant to paragraph (1) of subsection (c) of § 6-2124, to return the child to the home or to request the filing of a neglect petition in the Family Division of the Superior Court of the District of Columbia; [and]

(3) To maintain a program of treatment and services for families of neglected and abused children. . . .

D.C. Code § 6-2124. Services authorized; custodial placement; removal of child.

(a) When an investigation made pursuant to §§ 6-2102 and 6-2103 indicates that a child is an abused or neglected child and in need of services, the Chief of the Division is authorized to provide or secure any necessary services which may include:

(1) Emergency financial aid;

(2) Temporary 3rd-party placement with responsible neighbors or relatives for the child and his or her siblings: Provided, that the person with whom the child is placed shall not be considered an agent of the Department of Human Services;

(3) Emergency caretaker(s) who enter the home and provide temporary care for the child and his or her siblings in appropriate cases, when the consent of the parent or other custodian cannot be obtained, notwithstanding the provisions of the Act of March 3, 1901, as amended (31 Stat. 1324);

(4) The placement of homemakers in the home to maintain the child and his or her siblings or to assist the parent or other caretaker in discharging his or her responsibilities to the child;

(5) Day care for the child and his or her siblings;

(6) Counselling services for the child and his or her family;

(7) Medical evaluation and/or emergency treatment of the child by a qualified physician; and

(8) Other appropriate services or resources available in the community.

(b) When an investigation indicates that a child has been left alone or with inadequate supervision and a 3rd-party placement cannot be made, the Division is authorized to make a temporary custodial placement of the child: Provided, that:

(1) Notice is left for the parent or custodian which shall state the procedure for reclaiming the child;

(2) Efforts continue to locate the parent;

(3) The child is returned forthwith upon the request of the parent or custodian, unless there is additional evidence of immediate danger to the child and police action is taken pursuant to § 16-2309 (3) or (4); and

(4) A complaint alleging neglect is filed with the Superior Court of the District of Columbia:

(A) At the end of 5 days if the parent or custodian fails to claim the child within that time; or

(B) Immediately upon the discovery of additional evidence of immediate danger to the child.

(c) When an investigation made pursuant to § 6-2102 or 6-2103 indicates that a child is an abused or a neglected child and when it has been determined that the child cannot be adequately protected by any of the services set forth in

subsection (a) or (b) of this section or by any other services, the Chief of the Division is authorized to:

(1) Remove the child with the consent of the parent, guardian, or other person acting in loco parentis;

(2) Request the Corporation Counsel of the District of Columbia to petition the Family Division of the Superior Court of the District of Columbia for a finding of neglect and, where appropriate, the removal of the child; and

(3) Request the police to remove the child when the consent of a parent, guardian or other custodian cannot be obtained and the need to protect the child does not allow sufficient time to obtain a court order.

TITLE 11

CHAPTER 1. GENERAL PROVISIONS.

D.C. Code § 11-101. Judicial power.

The judicial power in the District of Columbia is vested in the following courts:

(1) The following Federal Courts established pursuant to article III of the Constitution:

(A) The Supreme Court of the United States.

(B) The United States Court of Appeals for the District of Columbia Circuit.

(C) The United States District Court for the District of Columbia.

(2) The following District of Columbia courts established pursuant to article I of the Constitution:

(A) The District of Columbia Court of Appeals.

(B) The Superior Court of the District of Columbia.

D.C. Code § 11-102. Status of District of Columbia Court of Appeals.

The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.

CHAPTER 11. FAMILY DIVISION OF THE SUPERIOR COURT.

D.C. Code § 11-1101. Exclusive jurisdiction.

The Family Division of the Superior Court shall be assigned, in accordance with chapter 9, exclusive jurisdiction of —

* * *

(9) proceedings in adoption; [and]

* * *

(13) proceedings in which a child, as defined in section 16-2301, is alleged to be delinquent, neglected, or in need of supervision. . . .

TITLE 16

CHAPTER 23. FAMILY DIVISION PROCEEDINGS.

Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.

Sec.

16-2301. Definitions.
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16-2303. Retention of jurisdiction.
16-2304. Right to counsel; party status.
16-2305. Petition; contents; amendment.
16-2306. Service of summons and petition.
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Subchapter III. Proceedings Regarding the Termination of Parental Rights of Certain Neglected Children.

16-2351. Purpose of the subchapter; construction of provisions.
16-2352. Definitions.
16-2353. Grounds for termination of parent and child relationship.
16-2354. Motions.
16-2355. Consideration of termination of the parent and child relationship at review hearings.
16-2356. Parties.
16-2357. Notice.
16-2358. Conduct of hearings.
16-2359. Adjudicatory hearing.
16-2360. Disposition after termination.
16-2361. Effect of termination decree.
16-2362. Decrees.
16-2363. Confidentiality of records.
16-2364. Unlawful disclosure.
16-2365. Termination decrees of other jurisdictions.

Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.

D.C. Code § 16-2301. Definitions.

As used in this subchapter —

(1) The term "Division" means the Family Division of the Superior Court of the District of Columbia.

(2) The term "judge" means a judge assigned to the Family Division of the Superior Court.

* * *

(9) The term "neglected child" means a child:

(A) who has been abandoned or abused by his or her parent, guardian, or other custodian; or

(B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian; or

(C) whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; or

(D) whose parent, guardian, or custodian refuses or is unable to assume the responsibility for the child's care, control or subsistence and the person or institution which is providing for the child states an intention to discontinue such care; or

(E) who is in imminent danger of being abused and whose sibling has been abused; or

(F) who has received negligent treatment or maltreatment from his or parent, guardian, or other custodian; or

(G) who has resided in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child is ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child.

* * *

(14) The term "shelter care" means the temporary care of a child in physically unrestricting facilities, designated by the Division, pending a final disposition of a petition.

* * *

(16) The term "factfinding hearing" means a hearing to determine whether the allegations of a petition are true.

(17) The term "dispositional hearing" means a hearing, after a finding of fact, to determine — . . .

(B) what order of disposition should be made in a neglect case.

* * *

(23) The term "abused", when used with reference to a child, means a child whose parent, guardian, or custodian inflicts or fails to make reasonable efforts to prevent the infliction of physical or mental injury upon the child, including excessive corporal punishment, an act of sexual abuse, molestation, or exploitation, or an injury that results from exposure to drug-related activity in the child's home environment.

D.C. Code § 16-2304. Right to counsel; party status.

* * *

(b) (1) When a child is alleged to be neglected or when the termination of the parent and child relationship is under consideration, the parent, guardian or custodian of the child named in the petition or in a motion to terminate is entitled to be represented by counsel at all critical stages of the proceedings, and, if financially unable to obtain adequate representation, to have counsel appointed in accordance with rules established by the Superior Court of the District of Columbia. . . .

D.C. Code § 16-2312. Detention or shelter care hearing; intermediate disposition.

(a) When a child is not released as provided in section 16-2311 —

(1) a detention or shelter care hearing shall be commenced not later than the next day (excluding Sundays) after the child has been taken into custody or transferred from another court as provided by section 16-2302; and

(2) a petition shall be filed at or prior to the detention or shelter care hearing.

* * *

(c) At the commencement of the hearing the judge shall advise the parties of the right to counsel, as provided in section 16-2304, and shall appoint counsel if required. He shall also inform them of the contents of the petition and shall afford the child, or in a neglect case, the parent, guardian, or custodian, an opportunity to admit or deny the allegations in the petition. He shall then hear from the Corporation Counsel to determine whether the child should be placed or continued in detention or shelter care under the criteria in section 16-2310. The child and his parent, guardian, or custodian shall have a right to be heard in their own behalf.

(d) (1) At the conclusion of the hearing, the judge shall —

(A) order detention or shelter care, setting forth in writing his reasons therefor, if he finds that the child's detention or shelter care is required under the critera in section 16-2310; or

(B) order the child released if he finds that the child's detention or shelter care is not required under such criteria.

(2) If a child is ordered released under paragraph (1) (B) of this subsection, the judge may impose one or more of the following conditions:

(A) Placement of the child in the custody of a parent, guardian, or custodian or under supervision of a person or organization agreeing to supervise him.

(B) Placement of restrictions on the child's travel, activities, or place of abode during the period of release.

(C) Any other condition reasonably necessary to assure the appearance of the child at a factfinding hearing or his protection from harm, including a requirement that the child return to the physical custody of the parent, guardian, or custodian after specified hours.

(e) When a judge finds that a child's detention or shelter care is required under the criteria of section 16-2310, he shall then hear evidence presented by the Corporation Counsel to

detemine whether there is probable cause to believe the allegations in the petition are true. The child, his parent, guardian or custodian may present evidence on the issues and be heard in their own behalf.

(f) When a judge finds there is probable cause to believe the allegations in the petition are true, he shall order the child to be placed or continued in detention or shelter care and set forth his reasons. When a judge finds that there is not probable cause to believe the allegations in the petition are true, he shall order the child to be released.

(g) The Division at a detention or shelter care hearing may not postpone the determination of whether detention or shelter care is required. For good cause shown, however, the Division may grant a continuance of any other part of the hearing (including the filing of a petition) for a period not to exceed five days.

(h) On motion by or on behalf of the child, a child in custody shall be released from custody if his detention or shelter care hearing is not commenced within the time set herein.

(i) If a child is not released after his detention or shelter care hearing and the parent, guardian or custodian did not receive notice thereof, the Division may, in the interest of justice, conduct a new hearing in accordance with rules prescribed by the Superior Court.

(j) Upon objection of the child or his parent, guardian or custodian, a judge who conducted a detention or shelter care hearing shall not conduct a factfinding hearing on the petition.

D.C. Code § 16-2313. Place of detention or shelter.

(a) A child who is alleged to be neglected and who is in custody may be placed at any time prior to disposition, only in —

(1) foster home;

(2) a group home, youth shelter, or other appropriate home for nondelinquent children; or

(3) another facility for shelter care designated by the Division, including an appropriate facility operated by the District of Columbia. . . .

D.C. Code § 16-2316. Conduct of hearings; evidence.

(a) The Division shall, without a jury, hear and adjudicate cases involving delinquency, need of supervision, or neglect. The Corporation Counsel shall present evidence in support of all petitions arising under this subchapter and otherwise represent the District of Columbia in all proceedings. . . .

D.C. Code § 16-2317. Hearings, findings; dismissal.

(a) Except as otherwise provided by statute or court rule, all motions shall be heard at the time of the factfinding hearing.

(b) After a factfinding hearing on the allegations in the petition, the Division shall make and file written findings in all cases as to the truth of the allegations, and in neglect cases, he shall also make and file written findings as to whether the child is neglected. If the Division finds that —

. . .

(2) in the case of a . . . neglect petition, that the allegations have not been established by the preponderance of the evidence, the Division shall dismiss the petition and order the child released from any detention or shelter care or other restriction previously ordered. If the proceedings are not terminated after the factfinding hearing, the Division shall review the need for detention or shelter care of the child.

(c) If the Division finds in a factfinding hearing that —

. . .

(2) the allegations in a . . . neglect petition have been established by the preponderance of the evidence,

the Division, after giving the notice required by subsection (e) of this section, shall proceed to hold a dispositional hearing. The Division may postpone a dispositional hearing to await the predisposition study and report of the Director of Social Services required by section 16-2319. . . .

(d) If the Division finds that the child is not in need of care or rehabilitation it shall terminate the proceedings and discharge the child from detention, shelter care, or other restriction previously ordered.

(e) The Division shall give prompt notice of any dispositional hearing as follows: . . .

(2) In neglect cases, to the child and to the parent, guardian, or custodian named in the petition if he can be found.

D.C. Code § 16-2319. Predisposition study and report.

(a) After a motion for transfer has been filed, or after the Division has made findings pursuant to subsection (c) of section 16-2317 sustaining the allegations of a petition and, in neglect cases, the conclusion that the child is neglected, the Division shall direct that a predisposition study and report to the Division be made by the Director of Social Services or a qualified agency designated by the Division concerning the child, his family, his environment, and other matters relevant to the need for treatment or disposition of the case. . . .

(c) (1) The report to the Division in neglect cases shall include, but not be limited to, the following information:

(A) the specific harms intervention is designed to alleviate;

(B) the plans for alleviating these harms including specific services, the proposed providers of the services recommended and the actions the parent, guardian, or custodian should take to alleviate these harms;

(C) the estimated time in which the goals of intervention may be achieved or in which it will be known that the goals may not be achieved; and

(D) the criteria to be used to determine that intervention is no longer necessary; and,

(2) If the removal of the child from his parent, guardian, or custodian is recommended, the report shall also include:

(A) the recommended type of placement;

(B) the reasons why the child cannot be protected in his or her home;

(C) the likely harm the child will suffer as a result of the separation from his or her parent, guardian, or custodian and recommended steps to be taken to minimize this harm; and

(D) the plans for maintaining contact between the parent and child through visitation rights in order to maximize the parent-child relationship consistent with the well-being of the child.

D.C. Code § 16-2320. Disposition of child who is neglected, delinquent, or in need of supervision.

(a) If a child is found to be neglected, the Division may order any of the following dispositions which will be in the best interest of the child:

(1) Permit the child to remain with his parent, guardian, or other custodian, subject to such conditions and limitations as the Division may prescribe, including but not limited to medical, psychiatric, or other treatment at an appropriate facility on an out-patient basis.

(2) Place the child under protective supervision.

(3) Transfer legal custody to any of the following —

(A) a public agency responsible for the care of neglected children;

(B) a child placing agency or other private organization or facility which is licensed or otherwise authorized by law and is designated by the Mayor of the District of Columbia to receive and provide care for the child; or

(C) a relative or other individual who is found by the Division to be qualified to receive and care for the child except that no child shall be ordered placed outside his or her home unless the Division finds the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home. It shall be presumed that it is generally preferable to leave a child in his or her own home.

(4) Commitment of the child for medical, psychiatric, or other treatment at an appropriate facility on an in-patient

basis if, at the dispositional hearing provided for in section 16-2317, the Division finds that confinement is necessary to the treatment of the child. A child for whom medical, psychiatric, or other treatment is ordered may petition the Division for review of the order thirty days after treatment under the order has commenced, and, if, after a hearing for the purpose of such review, the original order is affirmed, the child may petition for review thereafter every six months.

(5)The Division may make such other disposition as is not prohibited by law and as the Division deems to be in the best interests of the child. The Division shall have the authority to (i) order any public agency of the District of Columbia to provide any service the Division determines is needed and which is within such agency's legal authority and (ii) order any private agency receiving public funds for services to families or children to provide any such services when the Division deems it is in the best interests of the child and within the scope of the legal obligations of the agency.

(6) Terminate the parent and child relationship for the purpose of seeking an adoptive placement for the child pursuant to subchapter III of this chapter. . . .

D.C. Code § 16-2322. Limitation of time on dispositional orders.

(a) (1) A dispositional order vesting legal custody of a child in a department, agency, or institution shall remain in force for an indeterminate period not exceeding two years. Unless the order specifies that release is permitted only by order of the Division, the department, agency, or institution may release the child at any time that it appears the purpose of the disposition order has been achieved.

(2) An order vesting legal custody of a child in an individual other than his parent shall remain in force for two years unless sooner terminated by order of the Division.

* * *

(b) A dispositional order vesting legal custody of a child in an agency or institution may be extended for additional periods of one year, upon motion of the department, agency, or institution to which the child was committed, if, after notice and hearing, the Division finds that —

(1) in the case of a neglected child, the extension is necessary to safeguard his welfare. . . .

D.C. Code § 16-2323. Review of dispositional orders.

(a) When a child has been adjudicated neglected and a dispositional order has been entered by the Division, the Division shall hold a review hearing.

(1) at least every six (6) months for a child under the age of six (6) years who is committed to the custody of an agency, department, or institution;

(2) at least every six (6) months for a child of any age who is committed to the custody of an agency, department, or institution but has not been committed for longer than two (2) years;

(3) at least every year for all other children.

(b) At least ten (10) days prior to each review hearing the Division or the department, agency, or institution responsible for the supervision of the services to the child and his parent, guardian, or custodian shall submit a report to the Division which shall include, but not be limited to, the following information:

(1) the services provided or offered to the child and his parent, guardian or other custodian;

(2) any evidence of the amelioration of the condition which resulted in the finding of neglect and any evidence of new problems which would adversely affect the child;

(3) an evaluation of the cooperation of the parent, guardian or custodian with the Division or the applicable department, agency, or institution;

(4) in those cases in which the custody of the child has been vested in a department, agency, institution or person other than the parent —

(A) the extent to which visitation has occurred and any reasons why visitation has not occurred or has been infrequent,

(B) the estimated time in which the child can be returned to the home, and

(C) whether the agency has initiated or intends to initiate the filing by the Corporation Counsel of a motion requesting the termination of the parent and child relationship and any reasons why it does not intend to initiate the filing of such a motion; and

(5) such other information as may be required by rules of the Superior Court of the District of Columbia.

(c) A notice of a review hearing under this section shall be given to all parties and their attorneys of record as prescribed by rules of the Superior Court of the District of Columbia.

(d) If the Division finds that the commitment of the child to a department, agency, institution or person other than the parent is no longer necessary to safeguard the welfare of the child, the Division may order:

(1) the child returned to the home and the provision of supervision or other services; or

(2) any other disposition authorized by section 16-2320 (a).

Subchapter III. Proceedings Regarding the Termination of Parental Rights of Certain Neglected Children.

D.C. Code § 16-2351. Purpose of the subchapter; construction of provisions.

(a) The general purposes of this subchapter are to:

(1) encourage stability in the lives of certain children who have been adjudicated neglected and have been removed from the custody of their parent by providing judicial procedures for the permanent termination of the parent and child relationship in the circumstances set forth in this subchapter;

(2) ensure that the constitutional rights of all parties are recognized and enforced in all proceedings conducted pur-

suant to this subchapter while ensuring that the fundamental needs of children are not subjugated to the interests of others; and

(3) increase the opportunities for the prompt adoptive placement of children for whom parental rights have been terminated.

(b) This subchapter shall be liberally construed to promote the general purposes stated in this section.

D.C. Code § 16-2352. Definitions

(a) As used in this subchapter, unless the context otherwise requires:

(1) "Parent and child relationship" includes all rights, powers, privileges, immunities, duties and obligations existing under law between a parent and child, including rights of inheritance. The words apply equally to every child and every parent regardless of the martial status of the parents of the child.

(2) "termination of the parent and child relationship" means the adjudication that a child is free from the custody and control of either or both of his or her living parents by means of a court order that completely severs and extinguishes the parent and child relationship.

(b) The terms found in this subchapter which are defined in section 16-2301 of this chapter shall be given the same definition herein.

D.C. Code § 16-2353. Grounds for termination of parent and child relationship.

(a) A judge may enter an order for the termination of the parent and child relationship when the judge finds from the evidence presented, after giving due consideration to the interests of all parties, that the termination is in the best interests of the child.

(b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:

(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;

(2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;

(3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent;

(3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child; and

(4) to the extent feasible, the child's opinion of his or her own best interests in the matter; and

(5) evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to section 106 (a) of the Prevention of Child Abuse and Neglect Act of 1977. . . .

D.C. Code § 16-2355. Consideration of termination of the parent and child relationship at review hearings.

(a) After a child adjudicated neglected by the Division pursuant to this chapter has been committed by the Division to the custody of a department, agency or institution for more than eighteen (18) months and no hearing on a motion for the termination of the parent and child relationship has been held within the preceding twelve (12) months, the Division shall, at a review hearing, determine why a motion to terminate the parent and child relationship has not been filed.

(b) For each child who remains in custody for three (3) years or more, the Division shall, at each annual review hearing, detemine why a motion to terminate the parent and child relationships has not been filed.

D.C. Code § 16-2356. Parties.

Parties to a proceeding for the termination of the parent and child relationship shall be the child, the parent of the named child, and the agency having the legal custody of the child. The judge may at his or her discretion, name on his or her own motion or in response to a motion for joinder or intervention, join additional parties to a proceeding to terminate the parent and child relationship.

D.C. Code § 16-2360. Disposition after termination.

(a) If a judge finds that sufficient grounds exist for the termination of the parent and child relationship, the judge shall so order and decree and shall vest the legal custody of the child in a department, agency or institution.

(b) The department, agency or institution to which a child is committed after the termination of the parent and child relationship pursuant to this subchapter shall be responsible for seeking the prompt adoptive placement of the child and, if an adoptive placement has not been made within three (3) months, the department, agency, or institution shall list the child on all appropriate local, regional and national adoption exchanges. If an adoptive placement has not been made within six (6) months of the termination, a hearing shall be held and within every six (6) months thereafter the department, agency or institution shall report to the Division on its efforts to secure an adoptive placement, including but not limited to the following information:

(1) the extent to which an adoption has been explored with the child's foster parent and any reasons why an adoption by the foster parent is not appropriate;

(2) all adoption exchanges with which the child has been listed and the date of each listing; and

(3) the limitations placed on the families to be considered for the adoption of the child.

(c) The information provided pursuant to subsection (b) shall be provided to the guardian ad litem at least ten (10) days prior to a review hearing.

(d) A notice of a review hearing shall be given as prescribed by rules of the Superior Court of the District of Columbia to the child's guardian ad litem. Any person with whom the child has been living for six (6) months or more shall be given notice of hearings and shall upon his or her request be joined as a party to a review hearing.

(e) If the Division finds that the department, agency or institution vested with the custody of the child is not making sufficient efforts to secure an adoptive placement for the child or that inappropriate limitations have been placed on potential adoptive families, the Division may order such additional efforts as it deems appropriate or may order that the imposition of inappropriate limitations be eliminated or may transfer the power to consent to an adoption together with the vestment of legal custody to any other licensed child placement agency.

Supreme Court, U.S.
FILED

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No. 96- OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Appendix (Volume I) to
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7044 September Term, 1996

LaShawn A., et al.,
Appellees

v. FILED OCT 30 1996

Marion S. Barry, Jr., et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 89cv01754)

Before: WILLIAMS, HENDERSON, and RANDOLPH,
Circuit Judges.

JUDGMENT

This appeal was considered on the record before the United States District Court for the District of Columbia, and on the briefs of counsel and oral argument before this court. The issues have been accorded full consideration by this court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(h). It is

ORDERED AND ADJUDGED by this court that the judgment of the district court be affirmed. The District's primary point is that the judgment under review imposes requirements beyond those of District law. Cf. *LaShawn v. Kelly*, 990 F.2d 1319, 1326 (D.C. Cir. 1993) (directing district court "to fashion an equally comprehensive order

based entirely on District of Columbia law, if possible."). That point is not disputed. The judgment is based, however, in part on the District's earlier consent to substantially the same decree. That consent, to be sure, was conditioned on affirmance of the district court judgment on federal grounds. But it appears now largely undisputed -- especially in reference to the aspects of the judgment that extend beyond the precise provisions of District law -- that District law is not materially less demanding than federal law. Thus, the judgment under review does not extend beyond District law more than it extends beyond federal law. Accordingly, we infer that the district court reasoned that the substitution of District law alone as the basis of the decree, in place of reliance on federal plus District law, did not materially undermine the District's consent.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ *Eva Brown*
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 89-1754

LASHAWN A., *et al.*,
Plaintiffs,

v.

SHARON PRATT DIXON, *et al.*,
Defendants.

ORDER

In accordance with the Memorandum Opinion issued herewith and for the reasons set forth therein, it is this 18th day of April, 1991,

ORDERED that the defendants are hereby adjudged liable under 42 U.S.C. § 1983 for violating the federal and local statutory rights of all of the children in the plaintiff class and for violating the constitutional rights of those plaintiffs in the District of Columbia's foster care custody; and it is

FURTHER ORDERED that there shall be a status conference on May 10, 1991, at 9:15 a.m., in Courtroom 9, for the purpose of discussing the relief phase of this case. Prior to the status conference, the parties shall make a good faith effort to prepare a joint proposed schedule for resolving the final phase of this case.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

FILED APRIL 18, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 89-1754

LASHAWN A., *et al.*,
Plaintiffs,

v.

SHARON PRATT DIXON, *et al.*,
Defendants.

MEMORANDUM OPINION

This is a class action brought on behalf of children wh are in foster care under the supervision of the District o Columbia Department of Human Services (DHS)[1] an children who, although not yet in the care of the DHS, ar known to the department because of reported abuse o neglect.[2] It is a case about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the District to provide them with food, shelter, and day-to-day care. It is about beleaguered city employees trying their best to provide these necessities while plagued with excessive

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[1] The DHS is the District's umbrella social services agency. Within it are three commissions, including the Commission on Social Services (CSS). Within the CSS are five administrations, including the Family Services Administration (FSA). Within the FSA are three divisions, including the Child and Family Services Division (CFSD), which has the primary responsibility for the implementation and administration of the child welfare system within the District, including the foster care system.

[2] Because several of the original defendants, including former mayor Marion Barry, no longer hold office in the District of Columbia government, the Court is *sua sponte* substituting the current officials, including Mayor Sharon Pratt Dixon, as defendants.

caseloads, staff shortages, and budgetary constraints. It is about the failures of an ineptly managed child welfare system, the indifference of the administration of the former mayor of the District of Columbia, Marion Barry, and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.

The complaint in this case alleges both statutory and constitutional violations in the administration of the District's foster care system. These allegations include the failure of the DHS to initiate timely investigations into reports of abuse or neglect, the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

In over two weeks of trial, this Court heard testimony about the system's deficiencies from a vast array of witnesses, including experts in child welfare and child psychiatry, social workers and managers at the DHS, foster and adoptive parents, and the parent of two children who spent several years in the District's custody. The Court has before it over a thousand District admissions confirming many of the plaintiff class' allegations. The inescapable conclusion is that the foster care system operated by the DHS does not comply with federal law, District law, or, for those plaintiffs in the District's foster care, the United States Constitution. Defense counsel has argued that public institutions cannot solve the problems brought about by poverty, neglect, and abuse until society addresses their causes. Plaintiffs have not asked for a "perfect world," however, they merely request compliance with statutory and constitutional requirements and they ask not to be harmed while in the District's custody.

Mindful of the uncomfortable position in which the Court is placed by entertaining such a challenge to local government action, it is nevertheless compelled by the evidence to enter a judgment of liability against the defendant officials.[3] The Court shall defer ordering specific injunctive relief until after further briefing and argument by the parties.

I.

THE STATUTORY FRAMEWORK

Plaintiffs' complaint alleges that the District's practices in administering the city's foster care system violate numerous provisions of federal and District statutes. The federal statutes allegedly violated are the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 516 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-627 and §§ 670-679) (Adoption Assistance Act) and the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (January 31, 1974) (codified as amended at 42 U.S.C. §§5101-5106) (Abuse Prevention Act). The District statutes alleqedly violated are The Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at D.C. Code Ann. § 2-1351 to -1357, § 6-2101 to -2107, § 6-2121 to -2127, and § 16-2351 to -2365) (Abuse and Neglect Act) and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. Code Ann. § 3-801 to -808) (Licensure Act). Plaintiffs' complaint also alleges violations of the Child and Family Services Division (CFSD) Manual of Operations (September 1985) and reasonable professional child welfare standards.

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[3] The defendants in this action, all of whom are sued in their official capacities, are Sharon Pratt Dixon, mayor of the District of Columbia; Vincent Gray, director of the Department of Human Services; Barbara Burke-Tatum, commissioner of the Commission on Social Services; Elizabeth Parker, acting administrator of the Family Services Administration; and Evelyn Andrews, chief of the Child and Family Services Division.

A. Abuse and Neglect

The federal Abuse Prevention Act and the District's Abuse and Neglect Act both deal with the investigation of reports of abuse and neglect and the provision of services to families for whom reports are substantiated. The District law establishes a 24-hour intake unit within the CFSD, the function of which is to receive reports of abuse and neglect and respond with investigations and emergency services. D.C. Code Ann. § 6-2122(e). The federal law requires "prompt" investigations, 42 U.S.C. § 5106a(b)(2), whereas the District law requires investigations "within 24 hours of the receipt of the report." D.C. Code Ann. § 6-2102(b). The purpose of the investigations, according to District law, is to determine the nature and extent of the abuse or neglect, the person responsible for the abuse or neglect, the conditions in the home, and whether the health or safety of the children in the home are in jeopardy. D.C. Code Ann. § 6-2104. Both federal and District law require the DHS to take whatever steps are necessary to protect the health and welfare of a child for whom a report has been made. These steps may include providing emergency services so that the child may remain in the home, or removing the child and placing him or her in temporary care if the provision of services could not adequately protect the child. 42 U.S.C. § 5106a(b)(2) & (b)(3); D.C. Code Ann. § 6-2105 & 6-2124. Federal law requires "reasonable efforts" to prevent the removal of a child from the home or to return the child to the home if removal is necessary. Adoption Assistance Act, 42 U.S.C. § 671(15). District law similarly requires the CFSD to develop a plan for providing services to prevent the child's removal from the home or facilitate the child's return to the home if removal is unavoidable. D.C. Code Ann. § 6-2107. Finally, District law requires that if the child is removed from the home as a result of the investigation, within 90 days of removal the DHS shall either return the child to the home or request the filing of a neglect petition in the Family

Division of the Superior Court of the District of Columbia. D.C. Code Ann. § 6-2123.

B. Continuing Services

The federal Adoption Assistance Act and the District's Abuse and Neglect Act include provisions on placing children in foster care, preparing case plans, providing continuing services to children and their natural and foster parents, periodically reviewing the necessity and appropriateness of placements, recruiting adoptive families, and maintaining a system that comports with professional standards.

1. Placements

There are five ways a child may come into the custody of the DHS. The first is through voluntary placement, by which the child's parent or guardian voluntarily requests a temporary placement not to exceed 90 days. Before a child is taken into placement, a variety of in-home services directed at maintaining the child in the home must be offered or considered. CFSD Manual of Operations at § 601.1. Other methods of bringing a child into the custody of the DHS are through voluntary relinquishment of parental rights, *see id.* at § 601.2, temporary shelter care while a court action is pending, *see id.* at § 601.3, protective custody when a child has been left alone or with inadequate supervision, *see id.* at § 601.4, and police hold when a law enforcement officer has reason to believe the child is in immediate danger and removal is necessary. *See id.* § 601.5.

With respect to voluntary placements, also referred to as "emergency care" by the DHS officials, District law requires the CFSD to return the child to the home or request the filing of a neglect petition in the Family Division of the District of Columbia Superior Court within 90 days of placement. D.C. Code Ann. § 6-2123(2). Federal law requires return to the home within 180 days unless there has been a judicial determination that placement is in the best interests of the child. 42 U.S.C. § 672(e).

Federal law requires that children for whom placement is necessary be placed in "the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." 42 U.S.C. § 675(5)(A). *See also* CFSD Manual of Operations at § 602.5(a). Additionally, federal law requires that all foster homes and institutions receiving federal funds meet standards "reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights." 42 U.S.C. § 671(10).

2. Case Plans

Federal regulations require social workers to prepare written case plans within 60 days of the assumption of responsibility for a child. 45 C.F.R. § 1356.21(d)(2). Similarly, District law provides that case plans be prepared "as soon as possible" for children for whom there has been a substantiated report of abuse or neglect. D.C. Code Ann. §6-2107(b). This requirement is expanded upon in the CFSD Manual of Operations, which mandates a case plan within 45 days of the child's entry into care or within 30 days if the child has been voluntarily placed in care. CFSD Manual of Operations at § 401.2(a). To be in compliance with federal law, a case plan must contain a description of the home or institution in which the child is to be placed and a discussion of the appropriateness of such a placement. Additionally, the plan must set forth the agency's intentions for carrying out the voluntary placement agreement or judicial determination that resulted in the child's placement in foster care.[4] The plan

[4] Under the Adoption Assistance Act, states receiving federal monies under the Act must make foster care maintenance payments on behalf of children who are removed from the home as a result of either a voluntary placement agreement entered into by the child's parent or legal guardian or a judicial determination that remaining in the home would be contrary to the child's welfare and reasonable efforts to prevent placement have been made. 42 U.S.C. § 672(2).

must also include a program for providing services to the child and his or her natural and foster parents, with the goal of either returning the child to the home or permanently placing the child. The plan must further detail the services necessary to address the child's needs while in foster care and must discuss the appropriateness of the services that have been provided. Finally, the plan must include the health and educational records of the child, to the extent those records are available and accessible. 42 U.S.C. § 675(1).

The District's Abuse and Neglect Act requires similar information to be included in case plans and requires specific arrangements for the management of each case for which protective services are required. D.C. Code Ann. § 6-2107(b). The CFSD Manual of Operations is more specific, requiring case plans to include the reasons for placement, the goal for the child and the date it is to be achieved, the reasons for the choice of the goal, and the changes necessary to achieve the goal. CFSD Manual of Operations at § 401.2(h). Case plans must also include a visitation schedule specifying who will visit, how frequently visits will take place, where the visits will occur, and whether any conditions of supervision will apply. *Id.*[5]

3. Providing Services

The Adoption Assistance Act requires agencies to provide "proper care" to children in their custody and to provide services intended to facilitate the return of the child to the home or to place the child in a permanent family. 42 U.S.C. §675(1)

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[5] The District's laws governing proceedings in the Family Division of the District of Columbia Superior Court parallel the case plan requirements. These laws require a report to the court including a plan for providing protective services, the estimated time in which the goals of intervention may be achieved, and, if the child is in placement, the reasons why the child cannot be protected in the home and the plans for maximizing contact between the parent and child while the child is in placement. D.C. Code Ann. § 16-2319(c).

and § 627(2)(C). The District's Abuse and Neglect Act contains similar requirements. *See* D.C. Code Ann. § 6-2107(b), § 6-2123(a)(3), and § 6-2124. The services that the CFSD is authorized to provide include emergency financial aid, temporary third-party placement with neighbors or relatives, emergency caretaker services, homemaker services, day care, counseling, medical services, and other appropriate services available in the community. D.C. Code Ann. § 6-2124.

4. Periodic Reviews

Both federal and District law require periodic judicial or administrative reviews of the status of children in foster care. Federal law requires reviews at least every six months by either a court or administrative panel. The purpose of the reviews is to "determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship." 42 U.S.C. § 675(5)(B).[6] District law similarly provides that, once a child has been adjudicated as neglected, the Family Division of the Superior Court shall hold a review hearing every six months unless the child is over the age of six and has been in custody for longer than two years. D.C. Code Ann. § 16-2323(a).

5. Adoption

Federal law contemplates adoption for those children who cannot be returned home after services have been provided. 42 U.S.C. § 627(2)(B) & § 675(5)(B). District law is more specific, requiring the CFSD to "prepare a permanent plan for the child" when rehabilitative services fail to result in reuniting the child with his family within a reasonable time.

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[6] Federal law also requires a dispositional hearing no later than 18 months after the original placement, to determine the future status of the child. 42 U.S.C. § 675(5)(C).

D.C. Code Ann. § 6-2123(b)(2). District law also provides that when parental rights are terminated and a child is freed for adoption, the CFSD shall seek prompt adoptive placement. If no placement is made within three months, the CFSD shall list the child on all appropriate adoption exchanges. If no placement is made within six months, the CFSD shall report to the Court on its efforts to secure an adoptive placement. D.C. Code Ann. § 16-2360(b).

The CFSD's policy manual contains further requirements for recruiting adoptive families. The manual provides that, even when a child is not legally freed for adoption, his or her case must be referred to the Adoption and Placement Resources Branch of the CFSD within three days of the selection of adoption as a goal for the child. CFSD Manual of Operations at § 703.3.

6. System Infrastructure

With respect to the general infrastructure of the child welfare system in the District, both federal and local law have certain requirements: Federal law requires the District to maintain an information system from which the status, location, and goals for the placement of all foster care children may be readily determined. 42 U.S.C. § 627(2)(A). District law requires the maintenance of a Child Protection Register to index cases of abused and neglected children and assist in the treatment of those children. D.C. Code Ann. § 6-2111. District law also requires the CFSD to have "sufficient staff, supervisory personnel, and resources to accomplish the purposes of [the Abuse and Neglect Act], including the capacity to provide emergency and continuing service resources to abused and neglected children and their families." *Id.* at 6-2122(c). Moreover, District law requires the staff qualifications, caseload levels, and supervision requirements of the CFSD to be guided by the standards set out by the Child Welfare League of America or other child welfare organizations. *Id.* at § 6-2122(d).

C. Licensure of Foster Homes and Institutions

The District's Licensure Act requires every facility providing foster care in the District to be licensed and inspected annually. D.C. Code Ann. § 3-802 and 3-805(1). Facilities caring for District children outside the District must be inspected at least once a year. *Id.* at § 3-805(2).

II.

THE EVIDENCE PRESENTED AND THE COURT'S FINDINGS OF FACT

The Court was presented with various types of evidence during the lengthy trial of this case. First, the Court had before it over a thousand stipulated facts. Second, the Court was presented with several reports and case studies prepared by experts in the areas of child welfare policy and practice, social service methodology and research, the types and uses of automated information in public services programs, and the financing, administration, and delivery of human services. Third, the Court heard testimony from child psychiatrists, foster, adoptive, and natural parents, and employees of the DHS ranging from front-line social workers to upper-level management. After explaining more fully the nature of the expert evidence presented, the Court will make its findings of fact.

A. The Nature of the Expert Evidence

1. Walker Case Review

The complaint in this case names seven children as plaintiffs on behalf of the class. Their stories, according to plaintiffs, are representative of the stories of countless other children who have spent time in the District's foster care system. Introduced as evidence in this case is a report prepared by Clarice Dribble Walker, an expert in the field of child welfare policies and practices and an associate professor of social work at Howard University in Washington,

D.C.[7] For purposes of this litigation, Professor Walker prepared a "Case Review" of the case records of each of the named plaintiffs and the extent to which those records are in compliance with federal and District law and national professional standards (the Walker Report). Professor Walker based the report on her examination of the case records maintained by the DHS, as well as on deposition transcripts, reports by other experts in the field, and DHS documents, including the CFSD Manual of Operations. Professor Walker reviewed the cases in the context of her knowledge of the federal Adoption Assistance Act and Abuse Prevention Act and the District's Abuse and Neglect Act. The Walker Report details the experiences of each of the named plaintiffs in the District's foster care system, the social work and legal issues related to each, and the systemic problems identified in providing services to each of the children. The report concludes that the DHS has not complied with "the legal and social work mandate for permanency planning for children in the child welfare system," Walker Report at 5, because it has failed to make appropriate placements, set appropriate goals for children in placement, provide services toward the achievement of those goals, and move children through the system quickly so that they may obtain permanency by either returning home or being adopted.

2. Stein Case Reading

Serving as the basis for many of plaintiffs' allegations about the widespread and systemic deficiencies in the Dis-

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[7] Professor Walker also serves as chairperson for the direct services clinic at Howard University's School of Social Work. By virtue of this position, she is familiar with the policies and practices of the CFSD. Additionally, Professor Walker has served for 20 years as the senior consultant on child welfare issues for the National Black Child Development Institute. In 1989 she authored a study funded by the Skillman Foundation on the interventions and outcomes for black children entering foster care in 1986 in five cities across the country. Currently, Professor Walker serves on the Foster Care Commission of the Child Welfare League of America.

trict's foster care system is a Case Reading prepared by Theodore J. Stein, Ph.D., an expert in the fields of child welfare policy and practices and social science methodology and research (the Stein Report). Dr. Stein is a professor of social welfare at the State University of New York at Albany, where he has taught courses including "Child Welfare: Policy and Practice," "Research and Quantitative Methods," and "Law and Social Work." He has conducted six "case readings" since the passage of the federal Adoption Assistance Act and is currently working on another.[8]

Dr. Stein's case reading consisted of a review of a random sample of 675 case records for children in custody or formerly in the custody of the DHS and children who had been the subject of an investigation into a report of abuse or neglect.[9] This random sampling represents approximately 25 percent of the cases of children in foster care in the District, a figure that Dr. Stein testified is compatible with accepted scientific methodology.[10] The cases for review were selected using a table of random numbers.

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[8] Dr. Stein's professional accomplishments also include having published 24 articles and six books in the area of child welfare and presented numerous papers at professional conferences throughout the country. Dr. Stein has conducted numerous multi-state studies of various aspects of child welfare, many of which have been funded through federal grants. Dr. Stein has served as a consultant on child welfare policy for the American Bar Association, the United Kingdom, the state of New Mexico, the city of Philadelphia, and the state of Illinois, among others. His work for the state of New Mexico included developing a plan for the implementation of a federal court order regarding the state's child welfare system.

[9] Eighty percent of the sample records were for children in foster care or who had been in foster care in the year prior to the case reading. Nineteen percent were for children who had been the subject of an investigation. One percent was for children who had never actually been removed from their homes, although the DHS had reported them as being in foster care.

[10] Dr. Stein did not review a set percentage of cases of children who had been the subject of an abuse or neglect investigation, but reviewed a set number—127—of such cases.

The case review was intended to assess the District's compliance with the requirements of the federal and local statutes, the CFSD Manual of Operations, and relevant professional standards such as those of the Child Welfare League of America. To accomplish this end, Dr. Stein developed a case reading instrument broken down into 11 sections: four dealing with case plans; two with investigations of abuse and neglect; two with case reviews; one for demographic information; one for medical, psychological/psychiatric, and educational history; and one covering the monitoring of foster care and institutional facilities by the CFSD. The case reading instrument consisted of 99 pages and 178 multi-part questions. Two full-time supervisors and 18 full-time case readers assisted Dr. Stein with the case review. The case readers spent three days in training on how to use the case reading instrument and the case reading guidelines. Dr. Stein conducted two reliability tests throughout the course of the case reading, the first yielding 94 percent reliability and the second yielding 95 percent reliability. Data from the case reading instruments was entered into computers by six staff members hired for the project. Data entry was also tested for reliability, which was determined to be 99 percent.

Once the data from the case reading instruments was entered, Dr. Stein analyzed the data. His findings are broken down into eight areas making up Volume I of the case reading. These areas are: demographic information about the sample; information regarding abuse and neglect investigations; information describing case planning and service provision for children in foster care with plans of either return home, adoption, independent living, or continued foster care; information regarding medical, dental, psychiatric/psychological services, and educational progress; information on administrative and judicial reviews; and information on the monitoring of foster homes and institutions. Volume II of the case reading includes detailed case examples illustrating the findings reported in Volume I. Based on these findings and examples, Dr. Stein concluded in his report and in testi-

mony before this Court that, at the time of the case reading in early 1990, the District's foster care system was operating in much the same way as other jurisdictions had operated prior to the passage of the federal Adoption Assistance Act in 1980: as a holding system for children. Very few District children receive services to prevent their placement in foster care. Thirty-seven percent of children in the District's foster care system have been in care for four or more years and 62 percent do not have written case plans. Stein Report at 195. As a wrap-up to Dr. Stein's direct testimony at trial, he emphasized his conclusions by stating that he had not seen a system in the last eight to ten years that had made so little progress since the passage of the federal Adoption Assistance Act.

3. Center for the Study of Social Policy Report

In addition to the Walker and Stein Reports, plaintiffs introduced into evidence a report prepared by the Center for the Study of Social Policy (the Center), entitled *Children and Family Services in the District of Columbia* (September 1990) (Center Report), and consisting of an analysis of the District's child welfare system and recommendations for its improvement.[11] The Center is a nonprofit organization, based in Washington, D.C., that conducts policy research and analysis and provides technical assistance to state and local governments in various areas of human services, including child welfare. In the area of child welfare, the Center has directed comprehensive child welfare reform initiatives in three states and has provided direct technical assistance to over 20 states with respect to the financing, administration, and design of children's policies and programs. The Center staff consists of numerous professionals in the human services field and

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[11] Plaintiffs originally moved to have members of the Center's staff appointed as independent experts under rule 706 of the Federal Rules of Evidence. When this motion was denied, plaintiffs engaged the Center staff to prepare the report that was ultimately entered into evidence.

many specialists in child welfare policy. Testifying as experts during the trial of this case were three Center staff members who contributed to the report: Frank Farrow, Director of Children's Services Policy at the Center and former Executive Director of the Social Services Administration of the Maryland Department of Human Resources; Carol Wilson Williams, Ph.D., a senior research analyst at the Center and former professor of social work at the University of North Carolina and the University of California at Los Angeles; and Judith Meltzer, a senior research associate at the Center who specializes in federal entitlements funding under the Adoption Assistance Act and has offered technical assistance to a number of states regarding maximizing their federal reimbursements under the Act.[12]

The Center's report was prepared with two goals: to independently analyze the alleged deficiencies in the District's child welfare system and to propose concrete, feasible remedies for the future. The report analyzes the system in relation to the requirements of federal and District law, DHS and CFSD policies, and generally accepted professional child welfare practice. To conduct its analysis, the Center staff extensively reviewed DHS documents including all pertinent legal and policy documents produced by defendants. Center staff interviewed DHS employees, including case workers and supervisors within the CFSD, administrators in the Family Services Administration, and the Director of Income Maintenance at the DHS. Additionally, Center staff observed several depositions, including those of all four branch chiefs within the CFSD. The Center Report concludes that the District has consistently failed to meet the requirements of federal and District law and its own policy. These failures,

[12] Charlotte Haberaecker, although not a staff member of the Center, also contributed to the Center report and testified at trial. Ms. Haberaecker is a senior manager of Management Consulting Services in the Office of Government Services at the accounting firm of Price Waterhouse. She testified as an expert in the types and uses of automated information in public services programs.

according to the report, have resulted in a system that does not adequately protect at-risk children and families. *See* Center Report at i. For each area of the District's alleged failures, the report offers several specific recommendations for improvement, both short-term and long-term. In addition, the report sets forth a proposed "Sequenced Implementation Plan," including target dates, for putting the Center's recommendations into action. See Center Report at 75-80.

4. Psychiatrists' Testimony

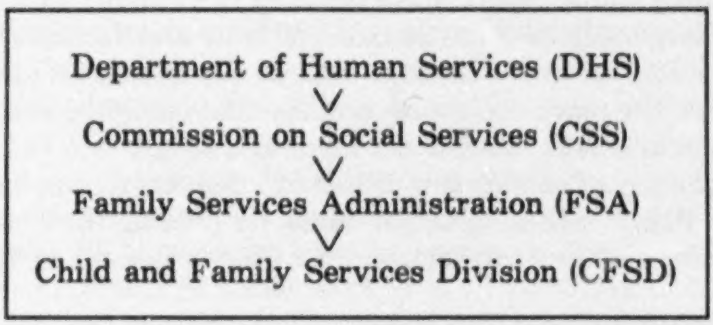
Testifying at trial were four child psychiatrists who had reviewed the case records of and conducted personal interviews with four of the named plaintiffs. Each gave their expert opinion on the psychological and emotional harm that the named plaintiffs have suffered as a result of the failures of the defendants to provide for their needs. In addition, Dr. Harold Eist gave his opinion about the psychological and emotional harm to all of the children in the plaintiff class, resulting from the systemwide deficiencies in the delivery of services to foster children and children who have been the subjects of reported abuse or neglect.

B. Findings of Fact

Based on all of the evidence presented, including the stipulations entered into by defendants, the Court issues the following findings of fact. To assist the reader in understanding the significance of these facts, the Court will first present some general findings and will then present the bulk of the remaining findings in categories that relate to the statutory framework detailed in Part I, *supra*. The Court will conclude with those findings involving harm to the plaintiff class.

1. General Findings

As the Court has previously explained, the DHS is the District's umbrella social services agency. To illustrate the hierarchy of the agency as it relates to this case:



The CFSD, which has primary responsibility for the implementation and administration of the child welfare system, is comprised of five branches:

The Intake and Crisis Services Branch (ICSB) is responsible for receiving and investigating reports of neglect filed with the CFSD. The branch maintains a 24-hour hotline specifically for this purpose. The branch also makes initial assessments of need and provides emergency and crisis intervention services. Two Intensive Services Branches (ISBs) are responsible for those cases for which an initial investigation indicates that the placement of a child is probable or that family breakdown is imminent or very likely without the provision of intensive services to the family. The branches were planned so that each social worker would handle a maximum of 20 cases and would work intensively with the assigned families in a short period of time. The Continuing Services Branch (CSB) is responsible for those cases for which the initial investigation indicates problems resulting from chronic conditions that require the continuing provision of services but are not likely to lead to total family breakdown. The branch also provides continuing services to children in foster care and their families. The Adoption and Placement Resources Branch (APRB) is responsible for recruiting foster and adoptive families, conducting home studies, and training foster and adoptive parents. Finally, the Monitoring Unit, which is not a "branch" but a separate unit reporting directly to the division chief, is responsible for monitoring all foster

homes and group homes in which children in the custody of the CFSD are placed and which are located within a 50-mile radius of the District of Columbia. The unit monitors these facilities to ensure compliance with all federal and local statutes and regulations. *See* CFSD Policy Manual at Chapter 100.

According to stipulations entered into by the parties, as of September 30, 1988, 2,166 children were in foster care in the District of Columbia. As of June 1989, the average stay for children in the District's foster care system was 4.8 years. This compares to a national average of just over two years. *See* Center Report at ii. According to the Stein Report, as of December 1989, 27 percent of the children in the District's custody had been in that status for more than five years and 60 percent had been in custody for more than two years. Approximately 95 percent of the children in the District's foster care are black.

2. Abuse and Neglect Investigations and Preventive Services

a. Timeliness of Investigations

Both federal and District law require prompt investigations into reports of abuse or neglect. 42 U.S.C. § 5106a(b)(2); D.C. Code Ann. § 6-2102(b). District law and CFSD policy specify 24 hours for initiating investigations and two weeks for completing investigations. D.C. Code Ann. § 6-2102(b) and CFSD Manual of Operations at § 301.15. Despite these stringent requirements, the stipulations entered into by the parties indicate that for several months during 1988, 1989, and 1990, the department consistently failed to initiate timely investigations into reports of neglect[13] and consistently failed to complete investigations within two weeks. In August 1988,

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[13] The CFSD is responsible for investigating only reports of neglect. The District's police department is responsible for investigating reports of abuse. D.C Code Ann. § 6-2104.

for example, the ICSB failed to initiate investigations into five reports of neglect it received that month, involving seven children. As the backlog began to worsen, the then-acting-chief of the CFSD, Evelyn Andrews, notified the administrator of the FSA in her November 1988 monthly report that:

> Staff shortages in the critical area of protecting children has [sic] required supervisors to take uncovered caseloads, staff to cover for co-workers who are in the field or on leave (there has been a significant increase in staff absenteeism), staff to attempt to fulfill the demands made through court orders, and make every effort to comply with mandated timeframes. It is virtually impossible to protect children in such an environment and under the current conditions. *Children are at risk.*

Stipulation 137. One month later, in December 1988, the branch failed to initiate investigations into 30 reports it received that month, involving 84 children. At that time, the branch also had a backlog of 584 reports, involving 828 children, for which investigations had not been completed.

Despite the dire situation within the CFSD in December 1988, the backlogs continued to worsen throughout 1989 and 1990. In June 1989, the ICSB failed to initiate investigations into 50 reports it received that month, involving 75 children. It also ended the month with a backlog of 716 reports, involving 1,285 children, for which it had not completed investigations. A study conducted in fiscal year 1989 by the chief of the ICSB revealed that the average length of time between the receipt of a report of neglect and the branch's initiation of an investigation was ten days.

Although the ICSB chief's report revealed serious and continuing failures to comply with District and federal law, the backlogs continued to grow. In January 1990, the ICSB failed to initiate investigations into 91 reports received during the month, involving 171 children. Additionally, it had

a backlog of 1,112 reports, involving 1,853 children, for which investigation had not been completed. At the end of January 1990, the ICSB had only 12 social workers assigned to it to conduct investigations. Defendants have stipulated that as of February 1, 1990, staffing shortages within the CFSD prevented workers from initiating investigations within the statutory time period.

The number of backlogged investigations dipped slightly in early 1990, so that by April 1990, a new study conducted by the chief of the ICSB revealed that the average length of time between the receipt of a report and the initiation of an investigation had dropped to four days. Nevertheless, for nearly 50 percent of the reports received during April 1990, the ICSB failed to initiate an investigation within 24 hours. Moreover, the branch ended each month between July 1989 and May 1990 with an average backlog of approximately 1,200 reports for which it had not completed investigations. The backlogs were reported by the then-chief of the ICSB, Carolyn Smith, to the chief of the CFSD, Evelyn Andrews, in June 1990. Ms. Smith also reported that the branch lacked a sufficient number of automobiles to investigate neglect reports within 24 hours. Ms. Andrews reported the situation to the then-administrator of the FSA, Jean Hunter,[14] in her June monthly report.

During the summer of 1990, the ICSB borrowed workers from other branches and tried to alleviate the backlog by working significant overtime hours. Nevertheless, by the end of August 1990, the ICSB had failed to initiate investigations into 41 reports it received that month, involving 93 children. It had also failed to complete investigations for 445 reports, involving 750 children. As of October 1990, it was

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[14] Ms. Hunter was originally named as a defendant in this action. She retired prior to the trial and defendant Elizabeth Parker is currently the acting director for the FSA.

taking the ICSB up to five days to initiate investigations into reports of neglect. According to the testimony of Carolyn Smith, as of December 1990, for the three units within the ICSB on the day shift, there were four vacancies out of a possible full staffing level of 15 social workers. On the evening shift, there were four vacancies out of five social worker positions. The midnight shift, primarily responsible for receiving reports and staffed in part with paraprofessionals, was fully staffed. Based on the foregoing facts, almost all of which have been stipulated, this Court finds that the CFSD has, since at least the beginning of 1988, continuously failed to initiate investigations into reports of neglect or abuse within 24 hours and complete investigations within two weeks. These failures have been largely due to staff shortages and the lack of access to resources, such as automobiles, necessary to conduct investigations. The Court also finds, based on the testimony of Dr. Williams, an expert in the field of child welfare policy, as well as Ms. Smith, the former chief of the ICSB, that the failure to initiate timely investigations can be partially attributed to the inability to screen out inappropriate reports. Although many jurisdictions use screening instruments to lessen the number of reports requiring investigations, District law currently requires the investigation of all reports of neglect or abuse.

b. Provision of Preventive Services

Both federal and District law require the provision of services to enable a child for whom a report has been made to remain in the home or, if removal is necessary, to enable the child to return home as quickly as possible. *See* 42 U.S.C. § 5106(b)(2) & (b)(3); D.C. Code Ann. § 6-2105 & 6-2124. The CFSD is authorized to provide services including emergency financial aid, shelter, emergency caretaker services, homemaker services, day care, counseling, medical services, and other appropriate services. D.C. Code Ann. § 6-2124. Based on the testimony of Dr. Stein and Professor Walker, the

Court finds that the CFSD has consistently failed to provide the services required to enable children to remain with their families or reunite with them if temporary placement is required.

According to Professor Walker's testimony and report, none of the case records of the named plaintiffs indicates that any services were provided to prevent placement. Similarly, according to the case reading conducted by Dr. Stein, none of the case records studied contained a judicial determination that "reasonable efforts" had been made to prevent placement, in accordance with federal law. Although defense counsel elicited through cross examination that the absence of a record of services in the children's case records does not necessarily mean that no services were provided, the Court finds little or no reason to believe that services were indeed provided. Testimony of social workers and of the former chief of the ICSB revealed that services frequently are not provided because they are not available. Defendants have admitted that although a number of parents have substance abuse and mental health problems, the CFSD has no drug treatment services or counseling services that it can provide directly to families in need. Similarly, although a substantial number of parents have housing and unemployment problems, the CFSD does not have the capability to directly provide housing or job services. Because the CFSD is unable to provide many direct services and does not have any priority access agreements with other agencies or organizations, defendants have candidly admitted that the CFSD has insufficient service resources to meet the "reasonable efforts" requirement of federal law. Based on the foregoing, the Court finds that defendants have consistently failed to provide services or otherwise use "reasonable efforts" to prevent placement. The result has been an increased risk of arbitrary or inappropriate placements as well as an increased cost to the District.

3. Continuing Services

a. Placement

Once a child has come into foster care, either through voluntary placement or emergency placement resulting from a substantiated abuse or neglect investigation, both federal and District law place limits on the time a child may remain in care without a judicial determination that placement is in the child's best interests. Federal law mandates that a child return home within 180 days unless such a determination has been made, 42 U.S.C. § 672(e); District law mandates return home within 90 days unless the CFSD has requested the filing of a neglect petition in Superior Court. D.C. Code Ann. § 6-2123(2).

By defendants' own admissions, since at least 1987, children have consistently remained in voluntary care for more than 90 days without the filing of a neglect petition. Between October 1, 1987 and September 30, 1988, nearly 75 percent of the children in voluntary placement had been in that status for longer than 90 days.[15] As of April 1988, there were children in voluntary care who had been in that status for as long as two years without any neglect petition having been filed. One of the named plaintiffs, LaShawn A., was in voluntary care for two-and-a-half years. Several of the other named plaintiffs were also in voluntary care well beyond the 90-day time limit imposed by District law. As of April 1988, defendants have admitted that there was no accurate listing of the number of children in voluntary care and that the DHS lacked a system for tracking voluntary care cases and for monitoring services to the families of children in voluntary care. These facts were presented to the

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[15] Between September 1987 and March 1988, the CFSD established a special unit known as the Emergency Care Unit within the Intensive Services Branch. During the six months the unit operated, it successfully reunited, within the mandatory 90-day time period, 27 of 68 children referred to it. As a result of budgetary constraints, however, the CFSD disbanded the Emergency Care Unit in March 1988.

administrator of the FSA in a memo submitted by Evelyn Andrews in July 1988. Ms. Andrews continued to submit similar memos to the administrator of the FSA throughout 1989 and 1990 as the problem continued to persist.

Based on defendants' admissions and the uncontroverted testimony of the experts in the case, the Court finds that the CFSD has consistently failed to comply with the statutory time limits regarding voluntary and emergency care. The result has been a state of limbo for these children who, while in "emergency care," do not have any case plans prepared on their behalf. The misuse of voluntary and emergency care in the District is one of the reasons why foster care drift has occurred for so many children in the District foster care system.

The evidence presented in this case has revealed that not only are children remaining in voluntary or emergency care beyond the statutory time limits, they are also spending much of their foster care experience in inappropriate placements. Federal law and CFSD policy require the placement of children in the least restrictive setting and in close proximity to their families. *See* 42 U.S.C. § 675(5)(A); CFSD Manual of Operations at § 602.5(a). According to Professor Walker's testimony and report, all of the named plaintiffs were placed inappropriately: LaShawn A., who came into the CFSD's care when she was two years old and was a "special needs" child,[16] was placed in the home of an elderly foster mother who had no intention of adopting her. Demerick B. came into care at 11 months of age and was placed in a congregate facility for three years rather than in a family foster home where he could have developed a continuous and affectionate relationship with a single adult. Gary C. and Leo C. came into emergency care when their mother was hospital-

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[16] According to the testimony of CFSD employees, a "special needs" child is one who is over five years of age, is part of a sibling group, or has physical or emotional problems.

ized for psychiatric treatment. They were placed in a congregate facility where they remained for nearly two years without a consistent, nurturing care giver. Robert D. came into care when he was a year-and-a-half old and was abandoned by his mother. He has been in six different family foster homes and one group home, experiencing no continuity of care and severe foster care drift. Tyrone E. was seven years old when he was removed from his home due to reports of abuse. Although he is a special needs child with severe emotional problems, he was inappropriately placed in multiple foster homes in which the foster parents had received no special training. He was also placed in over-restrictive out-of-state facilities that were hundreds of miles from his family. Kevin E. was placed in foster care when he was 20 days old and has spent all but 43 days of his life in foster care. He is a special needs child who has suffered additional trauma from the prolonged placement in congregate care as an infant and the experiences of at least three abrupt separations from foster families who had indicated plans to adopt him. He was inappropriately returned to his mother, who was an unfit parent, on several occasions. These inappropriate placements, along with others, have been partially the result of social worker vacancies that preclude sufficient training sessions and home studies to ensure appropriate placements.

Defendants have admitted that the demand for foster homes has outpaced the supply and that since at least January 1989, the CFSD has frequently been unable to place all of the children for whom it has received requests for placement. Since at least 1988, there has been an increase in the number of children entering foster care with special needs. Although these children cannot adequately be cared for in traditional foster homes, the DHS does not directly operate any therapeutic foster homes.[17] The only such homes avail-

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[17] Therapeutic foster homes are those in which the foster parents have been specially trained and receive special services to help them handle special needs children.

able to the CFSD are those operated by the Consortium on Child Welfare. As of November 1990, the department was making no efforts to develop therapeutic foster homes.

Similarly, although the CFSD needs foster homes designed to provide short-term or emergency care for children, it has no foster homes designated for this purpose. It also has an insufficient number of foster homes in which to place babies who have tested HIV-positive. Perhaps as egregious a fact as any is the defendants' own admission that the CFSD placement office has no automated information system to enable it to identify vacancies in foster homes, group homes, and institutions. The placement coordinator must telephone individual foster homes to determine if space is available. When the placement coordinator is unable to identify a placement vacancy, the task falls on the child's social worker and supervisor. The testimony of a frontline social worker within the CFSD, Chainie Scott, revealed that children often end up spending entire days in social workers' offices while the workers attempt to locate placements. In light of all of the foregoing facts, most of which have been stipulated, the Court finds that defendants have consistently failed to place children in the least restrictive placements consistent with their needs.

b. Case Planning

Federal and District law, as well as the CFSD's own policy, require the timely preparation of case plans for all children in foster care. *See* 42 U.S.C. § 675(a); 45 C.F.R. § 1356.21(d); D.C. Code Ann. § 6-2107(b); CFSD Manual of Operations at § 401.2. According to the uncontroverted testimony provided by plaintiffs' experts at trial, reasonable professional standards require case plans to articulate specific goals with realistic strategies and timelines for accomplishing them. Case plans are necessary to ensure that children receive proper care, are placed in appropriate settings, and remain in foster care no longer than necessary. To assure these things, a good permanent placement system for children

should ensure that children who cannot remain with or be returned to their biological parents be freed for adoption and placed in adoptive homes. When adoption is the goal, the responsible agency should aggressively recruit potential adoptive families and should implement all relevant procedures to allow children to become legally available for adoption in a timely manner. Long-term foster care should be used only rarely, and only when appropriate.

CFSD policy provides for five possible case plan goals: return home, placement with a relative or other person, adoption, independence, or continued foster care. Independence is only appropriate as a goal if the child is over the age of 16 and all other permanent options have been ruled out. Continued foster care is not to be the goal unless the child is at least 13 years old and all other permanency options have been ruled out because of the child's rejection of adoption due to an attachment to the foster parents or to the natural parents. CFSD Manual of Operations at § 401.4. Goals are to be set for one-year timelines and should not exceed 18 months, except for the goals of independence and long-term foster care.

Despite these policy guidelines, the evidence presented in this case establishes that children are often given totally inappropriate goals. According to the Stein Report, approximately 8 percent of the children in the District's foster care have a planning goal of independent living. Of those with such a plan as of December 1989, 35 percent had been assigned that goal before they were four years old and 49 percent had been assigned that goal before they were 16 years old. Approximately 10 percent of the children in the District's foster care have a planning goal of continued foster care. Of those with such a plan as of December 1989, 29 percent had been assigned that goal before they were one year old, 48 percent had been assigned that goal before they were four years old, and 54 percent had been assigned that goal before they were 10 years old. In 47 percent of these cases,

there was no evidence of efforts to return the child to his or her family, and in 56 percent of these cases, there was no evidence that the CFSD had considered adoption.

Dr. Stein's report revealed the following, among other things, with respect to the existence of case plans: Of the children in the District's custody with a planning goal of return home as of December 1989, 62 percent did not have a written case plan. Of the 38 percent who did have written case plans, none contained all of the information required by federal law. *See* 42 U.S.C. § 675(1) and the discussion at Part I(B)(2), *supra*. These plans routinely failed to include information on goals, strategies for achieving those goals, and timeframes. Also absent from the files of many of the children with goals of return home were visiting schedules mandated by the CFSD policy. *See* CFSD Manual of Operations at § 401.2(h). Seventy percent of these children had no parent-child visiting schedules in their records, 91 percent had no worker-child visiting schedules, and 94 percent had no worker-parent visiting schedules.

Professor Walker's report was also quite revealing: in none of the named plaintiffs' case records did she find a written case plan that contained all of the information required by federal and District law and reasonable professional standards.

The defendants' admissions strongly support the observations of both Dr. Stein and Professor Walker. The defendants have admitted that as of July 1990, the caseloads in the Intensive Services Branches and the Continuing Services Branch were so high that workers were unable to closely monitor families or develop case plans in a timely manner. With respect to implementing the goals set for children in foster care, the evidence speaks for itself: for those with goals of return home as of December 1989, 52 percent had had that goal for 18 months or more, 41 percent for two or more years, and 23 percent for three or more years. Even more revealing is the fact that the average stay for children in the

District's foster care system is just under five years—a third of their childhoods.

Based on the foregoing, the Court finds that the CFSD frequently assigns inappropriate goals to the children in its foster care and consistently fails to prepare written case plans to enable the children to realize their goals. Although defense counsel repeatedly elicited trial testimony that the need to respond to frequent "crises" often precludes the preparation of case plans, the Court finds, based on the uncontroverted expert testimony, that the results of not having a case plan may be just as devastating as the results of most crises. Without a case plan that sets forth a goal and a means of achieving it, children are relegated to spending significant chunks of their childhoods, if not their entire childhoods, in foster care, constantly bouncing from crisis to crisis.

c. Services

Just as the CFSD has often failed to provide any services to prevent the removal of children from their homes, the Court finds based on the evidence before it that the CFSD has consistently failed to provide services once children are removed from their homes and placed in foster care. The Stein Report indicates that, based on case records, of the children in foster care as of December 1989 whose goal was return home and who had entered into care through voluntary placement, the CFSD had failed to provide services in 77 percent of their cases. The failure to provide services designed to facilitate a child's return home is frequently due to the unavailability of those services.

The evidence reveals that the CFSD is failing to provide other necessary services as well—those that would constitute "proper care" under federal law. *See* 42 U.S.C. § 675(1). Although CFSD policy mandates that all children entering care undergo a complete medical evaluation prior to placement, see CFSD Manual of Operations at § 602.8(a), reports submitted by Evelyn Andrews to the administrator of the

FSA between May 1988 and May 1990 indicate that the CFSD did not have adequate medical screening facilities for children coming into care. Once in care, Dr. Stein's report indicates that as of December 1989, 44 percent had not had a medical examination since their entry into care. Seventy-nine percent had not had a dental examination.

Although CFSD policy requires that a social worker have "face-to-face contact" with each child in foster care at least once a month, see CFSD Manual of Operations at § 603.2(a)(1), Dr. Stein's report reveals that in the cases of 64 percent of the children in the District's foster-care custody with a planning goal of return home as of December 1989, there was no evidence that the children had ever been visited by their social workers. Of the children with a planning goal of adoption as of December 1989, there was no evidence of visits in 52 percent of the cases. According to defendants' own admission, as of October 1990, 149 children in the District's foster care had no social worker assigned to them.

Based on the foregoing, the Court finds that the CFSD has consistently failed to provide appropriate services and proper care to children in its custody.

d. Perodic Reviews

Both federal and District law require periodic judicial or administrative reviews for the purpose of determining the continued need for and appropriateness of placement. See 42 U.S.C. § 675(5)(B); D.C. Code Ann. § 16-2323(a). According to the Stein Report, of the children in foster care as of December 1989 who were eligible for a six-month review, only 13 percent had received a timely review. Defendants have admitted that as of August 1, 1990, children were not receiving timely administrative reviews. Based on the foregoing, the Court finds that the CFSD has consistently failed to comply with federal and District requirements regarding judicial and administrative reviews.

e. Adoption

District law requires that the CFSD "prepare a permanent plan" for a child when he or she cannot be returned to the home within a reasonable length of time. D.C. Code Ann. § 6-2123. According to the unrebutted testimony of plaintiffs' experts in this case, such permanency planning is also required, under all reasonable professional standards for child welfare. To achieve permanency for children who cannot return home, it is crucial that parental rights be terminated and that children be legally "freed" for adoption. Defendants have admitted that children who are not legally freed for adoption are less likely to be considered for adoption by prospective adoptive parents than those who have been freed. Nevertheless, of the children in the District's foster care with a planning goal of adoption as of December 1989, 66 percent had not been legally freed for adoption. As of July 30, 1990, the majority of children that the CFSD's adoption coordinator was trying to place were not legally freed. This results in "at-risk adoptions" in which a potential adoptive parent takes a child into custody with the risk that parental rights will not be terminated and the parent will never be able to legally adopt the child.

According to the Stein Report, for those children who, as of December 1989, had a planning goal of adoption but were not yet legally freed for adoption, in only 26 percent of the cases had information concerning terminating parental rights been submitted to an attorney. For half of these children, the CFSD staff had failed to discuss the possibility of relinquishment of parental rights with their mothers. Testimony on behalf of the defendants revealed that the blame for failing to terminate parental rights lies jointly with the District's Office of Corporation Counsel. Even when the CFSD provides the necessary information to an attorney in the Corporation Counsel's office, according to the testimony of Evelyn Andrews, the attorney often refuses to seek termination of parental rights until an adoptive family is found. This presents a Catch-22 because the Adoption and Placement

Resources Branch (APRB) often is unable to recruit adoptive parents until parental rights have been terminated. Additionally, defendants have admitted that although in the spring of 1990 an attorney was hired specifically to file and prosecute termination petitions, by August 1990, the Office of Corporation Counsel had not formally authorized the attorney to file such petitions. Based on the foregoing, the Court finds that the CFSD has consistently failed to expedite the progression of the children in its custody toward permanent placement through adoption.

Part of the CFSD's failures can no doubt be attributed to its noncompliance with its own policy that children with a goal of adoption be referred to the APRB within three days of setting that goal. See CFSD Manual of Operations at § 703.3. Nor has the CFSD complied with District law requiring certain recruitment efforts such as listing children on appropriate adoption exchanges. Defendants have stipulated that in the case of the named plaintiff Demerick B., for whom it was recognized early on that return home would be impossible, no referral to the APRB was made for a year-and-a-half after his last parental visit and two months after he was adjudicated as a neglected child. After the referral, which occurred in January 1988, Demerick's picture was never even displayed to a potential adoptive parent for another year. He was referred to only one adoption exchange. There was no case plan in Demerick's record until June 1989. In August 1989, when Demerick entered into an at-risk adoption placement, no motion had been filed to terminate parental rights. As of May 23, 1990, Demerick continued to be in foster care and was not yet legally adopted.

Dr. Stein's report reveals that the delays in Demerick's case also occur in the cases of numerous other children. For those in foster care as of December 1989 with a goal of adoption, the cases of only 29 percent had been referred to the APRB within the required three days. In 14 percent of the cases, notification was sent to the APRB more than a year

after adoption was chosen as a goal. Moreover, of the children who were freed for adoption as of December 1989 but who had not been placed in pre-adoptive homes, 24 percent had never been referred to the APRB for placement. Defendants have stipulated that the high caseloads of the social workers within the CFSD prevent them from making adoption referrals in a timely manner.

The evidence presented on both sides of this case reveals that once a child has been referred to the APRB for placement, the wait for an adoptive home may be lengthy indeed. Defendants have stipulated that as of August 1990, only one-and-a-half employees were responsible for recruiting all adoptive and foster parents. Since that time, according to the testimony of Geneva Ware, who was appointed supervisor of a newly created Recruitment Unit in August 1990, there have been three employees actively recruiting potential adoptive and foster parents. Nevertheless, as Ms. Ware admitted at trial, the unit's efforts to recruit have not kept up with the demand. The Court is somewhat encouraged by defendants' belated recognition of the need to enhance recruiting efforts, but notes that even as Ms. Ware was testifying about the inability to keep up with demand, another witness in this case testified that she had been waiting for over a year to adopt a foster child.

f. System Infrastructure

Federal and District law contain requirements pertaining to case tracking, caseloads, supervision, and training. The facts related to these "infrastructure" elements will be discussed in turn.

i. Case Tracking

Federal law requires any child welfare agency receiving federal funds to maintain an information system from which the status, location, and goals for the placement of all foster care children may be readily determined. 42 U.S.C. § 627(2)(A). Such a system is also mandated by reasonable professional

standards and, this Court believes, by basic common sense. Defendants have admitted that although its current information system, the WARD Tracking System (WTS), was designed to collect and process information regarding case management, client tracking, and vendor payments, the system is not adequate According to the unrebutted testimony of Charlotte Haberaecker, an expert in the types and uses of automated information systems for human services agencies, the WTS cannot provide accurate information on the number of children in emergency care, how long they have been in that status, and when they are reaching the 90-day deadline for remaining in that status. The WTS also is unable to accurately identify the physical location of all of the children in foster care. Additionally, it does not contain accurate information concerning vacancies in foster homes, nor does it contain accurate information regarding which social workers are assigned to which children.

Ms. Haberaecker's testimony is supported by numerous of defendants' admissions. Defendants have admitted that the CFSD lacks sufficient staff to operate and maintain the WTS. An April 1988 memorandum to the former administrator of the FSA warned that children were not being entered into the system in a timely manner, if at all. Defendants acknowledge that because much of the information in the system is missing or out-of-date, the system cannot generate accurate and meaningful reports about placement vacancies, overplacements, administrative reviews, court activity, family visits, or caseworker assignments. Although the system requires substantial upgrading, no budget money has been made available for the work. Instead, CFSD social workers track information on thousands of three-by-five-inch index cards. Over the last several years, the deficiencies in the system were repeatedly made known to high-level officials within the administration of the former mayor of the District of Columbia, Marion Barry, as well as to the mayor himself. In June 1989, the former administrator of the FSA met with then-mayor Barry to inform him that the system's

deficiencies precluded the CFSD from performing its assigned tasks.

The Court's concluding findings in this area are plucked from nearly 100 of defendants' stipulations regarding information tracking. In the words that defendants stipulated to:

> As of August 1, 1990, the District of Columbia had no information system that identified all children in the District's foster-care custody.

Stipulation 1549.

> The CFSD placement office has no automated information system so as to enable it to track the location of children placed in foster homes, group homes, or any other type of placement.

Stipulation 1563.

> In a memorandum dated March 27, 1990, the DHS employee responsible for the operation of the Ward Tracking System (WTS) notified the office of defendant Barbara Burke-Tatum [the commissioner of the Commission on Social Services] that it was necessary to confer upon the WTS office official status within DHS so DHS could qualify for federal reimbursement for WTS operations.

Stipulation 1567.

> In a March 30, 1990, memorandum, defendant Barbara Burke-Tatum was notified that, because the DHS office that operates the Ward Tracking System had no official status within DHS, the Department was unable to apply for federal funds that would otherwise cover 90% of the office's costs. According to the memorandum, "In a time of tight budgeting for direct services it is unconscionable not to maximize resources. It would be a relatively simple matter to place this office either in OIS or FSA where reimbursements would be forthcoming and adequate staffing could be provided."

Stipulation 1568.

> Because the DHS office that operates the Ward Tracking System had no official status within DHS, the Department was unable to apply for federal funds that would otherwise cover 90% of the office's costs.

Stipulation 1569. Based on the foregoing, the Court finds that the WTS is clearly inadequate for keeping track of the children in the District's foster care. The Court can only wonder how an agency that cannot track the location of the children in its custody can possibly comply with the remaining requirements of federal and District law, much less with reasonable professional standards.

ii. Caseloads

The Court need not look beyond defendants' own admissions to issue its findings in the area of social worker caseloads.[18] Defendants have admitted that the ICSB must be fully staffed in order to initiate investigations within 24 hours of receipt, that the ISB social workers should have maximum caseloads of 20 families so that they are able to provide needed casework services, and that CSB workers should have caseloads not to exceed 35 to 40 families per worker. These maximum caseloads have been greatly surpassed for at least the last several years, leading to the CFSD's inability to initiate timely investigations, provide needed services, ensure appropriate placements, prepare case plans, visit with foster children and parents, recruit foster and adoptive families, monitor foster homes and institutions, and claim all federal funding to which the CFSD should be entitled. The excessive caseloads have been due in large part to the department's admitted failure to fill social worker vacancies. This failure has been in part the result of the department's former policy of hiring "term" employees rather than permanent employees and of the low salaries in comparison to neighboring jurisdictions.

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[18] Defendants stipulated to over 200 facts in this area.

Defendants' admissions indicate numerous occasions over the past several years in which officials within the Barry Administration were made aware of the severe staff shortages within the CFSD. Scores of intradepartmental memos warn that the staff shortages may result in failure to comply with the District's Prevention of Child Abuse and Neglect Act and that staff must be hired to avoid serious injury or death to children in custody. As early as July 1988, the former mayor was notified by the chair of his Committee on Child Abuse and Neglect that the "severe staffing problem" in the CFSD was "creating a situation that is detrimental to the safety and well-being of children and the preservation of families. It has affected all levels of every program and service area, which adversely impacts upon the Division's ability to comply with Federal and District laws and regulations and to provide comprehensive services to families and children." Stipulation 1161. In August 1988, then-mayor Barry told CFSD workers that 32 new social workers would be hired by October l, 1988. This promise was the upshot of several meetings and memorandums from front-line social workers to high-level department officials. These social workers had complained that they were unable to adequately protect the safety of the children assigned to them because of the high caseloads and lack of resources such as automobiles. By October 1, 1988, only one new worker had been hired, seven had left, and the CFSD had not acquird new automobiles. As of October 10, 1988, only 10 new workers had been hired.

In June 1989, then-mayor Barry was again informed about the severe staff shortages. He was told that 41.3 percent of CFSD staff positions were vacant and that the "tremendous amount of stress that leads to worker burnout" contributes to the "rapid turnover" of social workers. Stipulation 1183. The former mayor was informed again in November 1989 and January 1990 that the CFSD was experiencing serious staff shortages. Nevertheless, on June 28, 1990, the District

of Columbia instituted a hiring freeze that barred filling CFSD vacancies.

Recently, the DHS has undertaken new efforts to fill its empty social worker positions. As of November 1990, according to the testimony of the acting administrator of the FSA, Elizabeth Parker, the department began hiring on a permanent basis. It is also converting its term employees to permanent positions. Additionally, according to Ms. Parker's testimony, the paperwork to increase social workers' salaries to a competitive level was, at the time of trial, on the city administrator's desk. The department has also run ongoing vacancy announcements and participated in job fairs and campus recruitments in an effort to recruit new workers.

Despite the evident attempts to attract workers, there is no indication yet that the past failures have been remedied. Instead, the fact remains that, at the time of trial in February 1991, 107 of a total of 239 social worker positions in the CFSD remained vacant. Chainie Scott, a social worker in the CSB, testified that as of January 1991, she was responsible for 69 families and 251 children. Although this was down from a high of 131 families and over 300 children, it was still well above the maximum caseloads that defendants have admitted must not be exceeded for social workers to do their jobs. Ms. Scott testified that even with her caseload down to 69 families, it is impossible for her to visit each child regularly. Instead, she sees the children only when a crisis arises or when a court hearing is approaching. The Court finds that, based on defendants' admissions, Ms. Scott's testimony, and the unrebutted testimony of plaintiffs' experts, the CFSD is unable to carry out its responsibilities under federal and District law while its social workers are operating at existing caseloads

iii. Supervision

The uncontroverted expert testimony presented to the court is that reasonable professional standards require super-

visors to play a role in educating, supporting, and directing staff; in ensuring quality control; and in ensuring that the child welfare agency's policies are carried out. By defendants' own admissions, the extreme staff shortages have resulted in CFSD supervisors carrying caseloads normally assigned to social workers. By carrying heavy caseloads, these supervisors have been unable to train staff and monitor cases to ensure the safety and well-being of the children for whom their staff is responsible.

iv. Training

According to the uncontroverted testimony of plaintiffs' experts, reasonable professional standards require specialized training for handling cases of child maltreatment and providing services. Ongoing training should be provided to case workers, managers, supervisors, social service representatives, foster parents, respite providers, parent aids, and homemakers. Although defendants agree that new social workers should receive formal training and existing social workers should receive ongoing training, until June 1990, no such training was available. In June 1990, the DHS hired James Oliver to set up a training program in the CFSD. At the time of trial, the CFSD had conducted two training sessions, involving approximately 70 social workers, in the areas of general information about the DHS, specific case planning and case management skills, and the requirements of federal and District law. The training sessions consisted of between 30 and 40 hours each but included no field training. Mr. Oliver testified that more training sessions are planned for the future and will be directed toward existing social workers, management, and clerical staff, as well as to new social workers. Mr. Oliver testified that he hopes to have completed a session of training for everyone in the CFSD by the end of 1991, at which time he will take over the position of chief of one of the Intensive Services Branches. Mr. Oliver stated that he anticipates ongoing training after 1991.

The testimony of Mr. Oliver indicates that defendants have at last taken positive steps toward implementing a training program that may eventually comply with reasonable professional standards. The Court remains concerned, however, that . . . Mr. Oliver's plan for continued training sessions is not embodied in any kind of written document submitted to the Court, as remains true of other promised reforms the Court heard about from the District. With the fragile budget situation that faces the CFSD, the DHS, and the District as a whole, there is no guarantee that training will not be cut due to lack of funding. The Court is also concerned that there is still no orientation training provided to new social workers before they begin working on cases. Chainie Scott and Thomas Wells, both social workers in the Continuing Services Branch, testified at trial that such training would have been very valuable to them. In sum, although the Court finds that the training program just initiated by defendants is a good start, it does not yet rise to the level that professional standards deem adequate.

5. Monitoring Foster Homes and Institutions

District law requires facilities providing foster care within the District to be licensed and inspected annually. Facilities caring for children outside of the District must also be inspected annually. D.C. Code Ann. § 3-802 & 3-805. Similarly, the CFSD Manual of Operations requires regular evaluations of all foster homes and facilities to ensure their quality and compliance with applicable laws and regulations. CFSD Manual of Operations at § 902.2.[19] The Monitoring Unit, within the CFSD, is responsible for this task. Unfortunately, as defendants have readily admitted, the same

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[19] The CFSD manual requires biannual reviews rather than annual reviews as required by District law. No explanation has been provided for this discrepancy; however, Evelyn Andrews testified at trial that the Monitoring Unit is responsible for yearly visits to traditional foster homes and group homes.

problems with staff shortages and high caseloads have negatively affected the Monitoring Unit's ability to carry out its responsibilities.

In preparing his report for use in this case, Dr. Stein requested the records of 123 foster homes in which 210 children were located. The Monitoring Unit provided him with the records of 108 foster homes.[20] All of these homes had been approved for the placement of children, but there was evidence of biannual reviews in only 57 percent of them.

The defendants' own admissions corroborate Dr. Stein's report. According to stipulations entered into by the parties, between December 1988 and July 1990, the Monitoring Unit failed to monitor any of the foster homes operated by the Consortium for Child Welfare in which District children were placed. In July 1990, the supervisor of the unit admitted that the unit had insufficient staff to monitor foster homes and group homes as required by the CFSD policy. The supervisor believed the unit needed two additional social workers to carry out its responsibilities. Based on the Stein Report and defendants' own admissions, the Court finds that the CFSD has consistently failed to monitor foster homes and institutions in accordance with the requirements of District law and CFSD policy.

6. Missed Financing Opportunities

Plaintiffs' experts and defendants themselves agree that early intervention and the provision of preventive services is more cost-effective than removing a child from the home. In a June 1988 Briefing Overview to then-mayor Marion Barry, the DHS reported that during fiscal year 1987, an average of $5,000 to $6,000 was spent per family per year for preventive services, while an average of $17,000 was spent on each child in specialized foster care and group homes and an average of $50,000 was spent on each child in residential

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[20] The other 15 could not be located.

treatment facilities. Virtually the same figures were presented to the mayor in the department's June 1989 Briefing Overview.

According to the uncontroverted testimony of Judith Meltzer, an expert in the financing, administration, and delivery of human services including child welfare services, the DHS currently allocates and spends funds in the least cost-effective way possible by spending large sums on out-of-home care and little on preventive services. According to Ms. Meltzer, by establishing a program to provide intensive in-home services to prevent the need for placement in foster care, the department could save from $1 to $2 million per year by the second year, assuming only a 40 percent success rate. Approximately 20 families could be provided intensive in-home family services for the cost of placing one child in a residential facility. In the case of named plaintiff Demerick B., Ms. Meltzer estimates that the DHS could have saved roughly $12,000 per year by placing Demerick in a foster home with supportive services rather than in the expensive residential treatment facility where he spent three years.[21] Had he been placed in an adoptive family, the department probably would have spent roughly $12,000 over the entire three-year period. In the case of named plaintiff Tyrone W., Ms. Meltzer estimates that placements in three foster homes, two hospitals, and two residential treatment facilities over a 28-month period cost the DHS approximately $100,000. Alternatively, had the DHS provided Tyrone and his family with intensive in-home services including mental health counseling, day care, and homemaker services, designed to prevent Tyrone's removal from the home, the estimated cost would have been $46,000. Defendants have offered no expert

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[21] Ms. Meltzer estimates $17,000 per year per child for placement in a foster home with supportive services and $29,000 per year for placement in St. Ann's Maternity and Infant Home, where Demerick was placed. The cost for placement in St. Ann's is based on the monthly cost as of the summer of 1990.

testimony to rebut Ms. Meltzer's estimates or her conclusions. Based on this, the Court finds that the DHS is not using its funds in a cost-effective manner, resulting in children being removed from their homes and placed in foster or institutional care without any reasonable efforts having been expended to permit them to remain at home.

In addition, Ms. Meltzer gave uncontroverted testimony that the District is currently losing millions of dollars in available federal funds because of its serious management and systemic deficiencies. Federal reimbursements under the Adoption Assistance Act are "open-ended." That is, there is no cap on the amount of money a state agency may receive for certain eligible activities or services provided to eligible children. States and the District of Columbia are reimbursed according to an established "Federal Financial Participation" rate, which is 50 percent for most eligible activities and 75 percent for eligible training activities. To receive federal reimbursements under the Act, the claimant must establish not only the eligibility of the activity, but the eligibility of the child benefiting from that activity. Eligibility for reimbursements under the Act is tied to eligibility for the Aid to Families with Dependent Children (AFDC) program. At least 75 percent of children in the District's foster care are AFDC eligible, yet the CFSD had established eligibility under the Adoption Assistance Act for only 24 percent in July 1987 and 22.6 percent in July 1988. This compares to eligibility rates of 72 percent in New York City, 64 percent in Pittsburgh, 56 percent in Philadelphia, and 50 percent in Montgomery County, Maryland, an affluent suburb of the District of Columbia

In fiscal years 1985 and 1986, the U.S. Department of Health and Human Services (HHS) disallowed 76 percent of the District's claim for $7.8 million in reimbursements under the Act. The HHS report attributed the high rate of disallowance to noncompliance with federal regulations and the department's own policies and procedures. Some of the

claims were disallowed due to the CFSD's failure to obtain court-ordered custody of children who had been in the District's care for more than 180 days. Some were disallowed because children were in homes that did not have current licenses or did not qualify as foster homes. Still others were disallowed because there were no case records for children on whose behalf payments were to be made.

Ms. Meltzer estimated that due to the DHS's failure to properly establish eligibility under the Adoption Assistance Act for all children entering the system, its failure to properly document and claim all allowable training and administrative costs under the Act, and its failure to comply with all of the procedures that must accompany claims, the District is currently losing approximately $14 million a year in potential funding under the Adoption Assistance Act. In addition, it is losing another $7 million per year in Medicaid funding due to its failure to establish and maintain Medicaid eligibility for the children in its care, among other things. In total, Ms. Meltzer and the Center Report conservatively estimate that the District could obtain, at a minimum, an additional $21 million a year in federal reimbursements by ensuring that the proper procedures for making the claims are carried out.[22] Other states have seen even greater increases. According to Ms. Meltzer's testimony, the state of Ohio received $5.8 million in reimbursements in 1984, but after embarking on a concerted program to maximize its revenue assistance, received $52 million in reimbursements in 1990. Similarly, the state of Pennsylvania increased its reimbursements from $43 million in 1984 to $97 million in 1990.

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[22] Although defendants did not offer any expert to rebut Ms. Meltzer's estimates, the Center Report indicates that the Director of Income Maintenance within the department has previously estimated that the District could realize an additional $10 to 12 million in Adoption Assistance Act funds per year by making a number of administrative changes. This estimate is not far from Ms. Meltzer's $14 million estimate.

The Court gives credit to the testimony of Elizabeth Parker, current acting administrator of the FSA, that after federal reviews in 1987, 1988, and 1989, the department was never notified that it was ineligible for federal funding. The Court nevertheless finds, based on Ms. Meltzer's testimony, that the amount of federal funding could have been greatly increased had the department complied more fully with federal laws and regulations and CFSD policy. The Court has listened to defense counsel argue that the District is operating at a severe deficit and that all departments within the city are under stringent budgetary constraints. In essence, defense counsel has argued that compliance with federal and local laws is impossible. The experiences of other states, such as Ohio and Pennsylvania, show that it is not impossible. Moreover, the evidence shows that over a five-year period, by expending a minimal effort, the District could obtain over $100 million in federal funding. The Court finds it disingenuous for the District to blame its inadequacies on a lack of funding when it has failed to obtain the generous funding that is readily available to it.

7. The Proposed Realignment

Throughout defendants' case in chief, the Court was presented with much testimony about a proposed "realignment" that the CFSD is undergoing to better carry out its responsibilities. Evelyn Andrews, chief of the CFSD, testified that the division intends to realign itself in a way that provides for social workers to specialize in certain areas and thereby reduce their caseloads. Ms. Andrews testified that various committees were working on a plan for realignment. Despite the Court's repeated requests for documentation of this alleged plan, the best that defendants were able to provide was a brief proposed organizational chart for the realigned division. This chart indicates that under the division chief would be three deputy chiefs: one for "Prevention and Protection," one for "Foster Care and Adoption," and one for "Operations." Under the deputy chief for Prevention

and Protection would be the "Prevention, Intake and Crisis Services Branch" and the "Child Protective Services Branch." Under the deputy chief for Foster Care and Adoption would be the "Foster Care Services Branch" and the "Adoption Resources Branch." The deputy chief for Operations would be responsible for the Monitoring Unit, the WARD Tracking System, and other administrative functions. No document provided to the Court suggests any time frame for instituting the proposed realignment or any strategy for making it work to reduce caseloads and increase compliance with federal and District law. Nor did Ms. Andrews' testimony provide the Court with any guidance in this regard. Ms. Andrews testified that the plan was not in final form, but that she was aware of some administrative level changes due to take place in the next few weeks. She did not apprise the Court of the details of these changes.

The Court is encouraged that defendants are finally attempting to alleviate some of the deficiencies in the current system. Nevertheless, the Court simply does not have enough evidence detailing the proposed realignment in order to make a finding that the realignment will remedy all of the system's failures, which have been elaborately detailed above. No one has explained how specialization will reduce caseloads or when the specialization is to take place. The court cannot ask plaintiffs to rely on defendants' good faith but as yet unsubstantiated promises to improve.

It is not sheer coincidence that the proposed realignment has been suddenly undertaken in the past few months. Based on the testimony of several of defendants' witnesses, it is clear that many of the District's steps toward improvement were instituted after discovery was largely completed, plaintiffs' experts had completed their reports, and the prospect of a full trial on the merits had become likely. It wasn't until June of 1990, eight months before trial, that the DHS hired someone to set up a training program for social workers, managers, and support staff within the CFSD. It wasn't until

August of 1990, six months before trial, that the DHS established a Recruitment Unit within the CFSD, solely for the purpose of recruiting foster and adoptive homes. It wasn't until November of 1990, three months before trial, that the DHS began hiring social workers on a permanent, rather than temporary, basis. At the time of trial, there was still no concrete evidence that existing social workers had been converted to permanent positions, although the evidence indicated that a conversion was planned. It wasn't until January of this year, a month before trial, that the caseloads of social workers such as Chainie Scott were reduced.[23] It wasn't until the time of trial itself that the chief of the ICSB was asked to prepare a risk assessment tool for use during investigations of neglect reports. The person assigned this task admitted at trial that he was only "a little" familiar with the Child Welfare League standards concerning risk assessment. In short, the Court is concerned that the department's efforts to improve may have been motivated only by this.litigation and, without continued litigation or a court order, the motivation for continued restructuring and improvement will subside.[24]

8. Harm to the Children

The Court has found that the DHS has, at least since 1987, consistently failed to comply with the requirements of the federal Adoption Assistance Act, the District's Abuse and Neglect Act, the CFSD Manual of Operations, and reasonable professional standards. Although common sense dictates that these widespread and systemic deficiencies have caused harm to the children in the District's foster care, plain-

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[23] As the Court has previously found, even after the reduction, the caseloads of the CFSD's social workers far exceed any reasonable professional standards and make it impossible for the social workers to effectively carry out their functions.

[24] The Court's concerns are fueled by the fact that no written documentation on the goals, objectives, and methodology of the proposed realignment was supplied to the Court.

tiffs have nevertheless introduced substantial uncontroverted evidence regarding the nature and scope of that harm.

a. Harm to the Named Plaintiffs

Testifying on behalf of plaintiffs were four child psychiatrists. Each had examined one of the named plaintiffs, both personally and through a review of the child's case records. Each had an opinion regarding the harm that had resulted from the child's experience in foster care.

i. LaShawn A.

Dr. Harold Eist, a child psychiatrist who is on the faculty at Howard University and has treated over 5,000 inner city children, offered his opinion about the psychological and emotional stability of LaShawn A. LaShawn came into custody in September 1986, when she was two-and-a-half years old. She was placed in voluntary care by her mother, who was homeless and could not care for LaShawn because of emotional problems. No services were offered to enable her to remain at home. LaShawn was placed in the foster home of a woman in her sixties who had no interest in adopting LaShawn. She had no contact with her natural family for at least two years after she came into care. During this period, a psychiatrist who examined her discovered potential psychiatric problems and developmental delays. She was placed in a therapeutic nursery in the summer of 1987. In November 1988, her mother visited her. In January and February 1989, LaShawn's mother failed to show up for scheduled visits. A subsequent visit from her mother did not go well. In April, she was visited by her father, who had been incarcerated when she entered foster care. LaShawn remained in emergency care status until May 1989, two-and-a-half years after her entry into the District's physical custody. A psychiatric evaluation conducted that month indicated she may have been experiencing an overuse of physical punishment and perhaps even sexual abuse in her foster home. At the time of trial, LaShawn remained in the same foster home.

Dr. Eist examined LaShawn in July 1990. He described her as an attractive, neatly groomed six-and-a-half-year-old who separated easily from the social worker who brought her to his office. He testified that LaShawn was frenetically hyperactive and lost concentration easily. Her developmental delays became evident when she could not play tic tac toe nor draw a straight line. When Dr. Eist asked her who loved her, LaShawn replied "no one." When he asked her who hated her, she said her foster mother. Dr. Eist testified that LaShawn indicated that her foster mother beat her. Dr. Eist concluded that LaShawn suffered from "Attention Deficit Hyperactivity Disorder" (AD-HD), was severely emotionally delayed, and was overwhelmed by stimuli. He opined that her prognosis was grave and that she will likely experience four to six exacerbations of depression throughout her adulthood, lasting anywhere from one to four years each. Although Dr. Eist admitted that the cause of AD-HD is unknown and that there was evidence that LaShawn had psychological problems before entering foster care, he concluded that the mishandling of her case while in custody contributed to her disorders. He testified that LaShawn has benefited from the therapeutic nursery, but that she needs occupational training, additional support services, contact with her siblings, and a decision about her final placement. Dr. Eist opined that had LaShawn been in a caring family who lobbied for services to provide for her special needs, there is a strong likelihood that her AD-HD would not be as severe and her depression would be seriously ameliorated. The longer she remains with her current foster mother, according to Dr. Eist, the less she may be able to benefit from adoptive placement.

ii. Leo C.

Dr. Gordon Kirschner, a child psychiatrist with experience in psychoanalysis and the treatment of children, adolescents, and adults, reviewed the case records of Leo C. and examined him on July 18, 1990. Leo came into custody in 1982 when

he was two-and-a-half months old and his mother was admitted into a psychiatric facility. Although case workers almost immediately determined that Leo should be a candidate for adoption, the department returned Leo to his mother six months after he came into care. Leo's mother then had another baby, her fifth, in the fall of 1983. In May 1984, Leo's mother requested that he and his new brother, Gary, be placed in foster care while she sought psychiatric hospitalization. The children did not come into care, however, but were sent to stay with their maternal grandmother in June 1984. Later that month they were left with a neighbor who called the DHS to have them placed in emergency care. Leo and Gary remained in a foster home until February 1985, when their foster mother requested their removal. The children were returned to their mother. In June 1985, their mother placed them in voluntary care so she could be hospitalized for depression. After she left the hospital, the children were again returned to her. In 1987, the children again came into the District's custody and have remained there ever since. They were in an institution until late 1988, after which they were placed in a foster home. Since May 1989, both children have been on psychoactive medications to control their behavior. Their case goals remain "return home" even though their mother has been uncooperative and has not visited regularly. According to the testimony of Dr. Kirschner, the foster mother caring for Gary and Leo "dropped out of the picture" while they were at camp in the summer of 1989. They have been with their step-grandmother ever since.

Dr. Kirschner described Leo as notably unemotional and unattached to his step-grandmother, even though he had spent the previous 18 months living with her. Dr. Kirschner described him as cooperative, but inclined to change the rules of the games they played in order to suit himself. He testified that Leo suffered from AD-HD and developmental disorders and that Leo had a poorly formed internal representation of other people, including his mother and strangers. Dr.

Kirschner opined that Leo's problems will continue into adulthood. He testified that he believed the frequent changes in Leo's living situation and the inadequacies of Leo's mother had caused many of Leo's difficulties. Had Leo been adopted by the time he was three, Dr. Kirschner opined, he would not have experienced the same disorders. Nevertheless, Dr. Kirschner believes Leo could still benefit from adoption.

iii. Robert D.

Dr. Richard Gross, a child psychiatrist with extensive experience treating children in foster care, reviewed the records of and personally examined Robert D. This child came into care when he was 14 months old after his grandmother filed a report that he had been neglected. He was in foster care from January 25, 1980 until November 6, 1980, when he was returned to his mother. In January and February 1984, the department was notified by Robert's sister's school principal and by the Metropolitan Police Department's Youth Division that the family was in need of assistance. Nothing in the record indicates any visits by the assigned social worker until Robert entered emergency care in July 1985. After his first foster mother beat him, he was placed in a different foster home. He lived in this home from the fall of 1985 until 1988. The goal listed on Robert's April 1987 case plan was adoption. His mother signed an agreement relinquishing parental rights on June 1, 1987, but the agreement was never processed because it apparently was lost. Robert's May 1988 case plan inexplicably listed a goal of family reunification. In December 1988, Robert moved to his fourth foster home, where he remained until September 1989. Robert's April 1989 Disposition Report, written when he was 10 years old, states that his planning goal is long-term foster care. In late 1989, Robert was placed in a group home.

Gross described Robert as being concrete and literal in his thinking, exhibiting poor judgment and little enthusiasm. He testified that Robert had low self-esteem, felt no sense

of belonging, and expressed an unusual fear and distrust of people. Robert refused to draw a picture of a person or play with the doctor's puppets that looked like people. Dr. Gross testified that Robert told him "you can't trust people, they die in front of your face." According to Dr. Gross, Robert suffers from depression, adjustment disorders, and learning disabilities that are likely to follow him into adulthood and prevent him from undertaking normal life activities such as holding down a steady job. Dr. Gross opined that Robert's problems were caused by the early lack of a relationship with his mother and the continuing lack of a relationship with any single caregiving adult. Although Dr. Gross acknowledged that Robert's problems were fairly characteristic of children in foster care, he believed that placement in one continuous and appropriate foster home could have provided Robert with a greater chance of success. Similarly, Dr. Gross testified that he believes that if Robert had been adopted earlier, he would be a more integrated and successful child.

iv. Kevin E.

Dr. William Clotworthy, Jr., a child psychiatrist who was the clinical director for the Christ Child Institute for Children for 15 years, reviewed the records of and personally examined Kevin E. With minor exceptions, Kevin has been in the District's custody for his entire life. He came into custody following his release from the hospital 20 days after he was born. Kevin is now 11 years old. He has been in 11 different placements, including foster homes, group homes, residential treatment facilities, and hospitals. At one time he was in a foster home with his mother, who was also in the District's custody. Kevin was not freed for adoption until he was eight years old. Kevin was hospitalized in 1988 after exhibiting behavior that included running away from home, head banging, suicidal thoughts, auditory hallucinations, and temper tantrums. He told hospital staff that he hated himself and he climbed into a trash can and asked to be thrown away. Kevin was placed in Villa Maria, a residential treatment

facility in Baltimore, Maryland, in the fall of 1988. Reports from the institution in 1989 indicate that he might not be able to tolerate the intensity of a family setting due to his history of abandonment. Although adoption has been Kevin's planning goal for much of his life, his case has never been referred to the Adoption and Placement Resources Branch.

Dr. Clotworthy examined Kevin on July 30, 1990. He described Kevin as engaging, articulate, and cooperative, but with a severe case of AD-HD. According to Dr. Clotworthy, Kevin was easily distracted and frustrated, had poor impulse control, and suffered from mild learning disabilities in the form of speech and language delays. Dr. Clotworthy testified that the record revealed Kevin's low self-esteem and difficulty trusting people. Dr. Clotworthy opined that these conditions are likely to be long-lasting and that Kevin's tendency to react strongly to both hard and medium "bumps along his road" may affect his ability to hold a job. Dr. Clotworthy testified that he believed that the frequent changes in placements were each interpreted by Kevin as being his fault and signifying that something was wrong with him. Each was an enormous blow. Dr. Clotworthy opined that if social workers had been attuned to his special needs earlier, the outcome for Kevin could have been quite different. In Dr. Clotworthy's opinion, Kevin was moved at inappropriate times, was returned to his mother inappropriately, was not prescribed medication early enough (to control his depression and hyperactivity), and was generally not provided with the help he needed to be a success in school or at other endeavors. Dr. Clotworthy testified that any trained social worker should have realized his needs much earlier and realized that there was no chance of returning him to his mother. Dr. Clotworthy expects Kevin to experience regression and an increase in symptoms when he is forced to leave Villa Maria.

b. Harm to the Plaintiff Class

The uncontroverted testimony of Dr. Eist, Professor Walker, Dr. Williams, and other of plaintiffs' experts leads

the Court to find that regular, constant, reliable relationships with adults are critical to the development of children. For children in foster care, regular visits with their social workers, parents, and siblings are crucial if there is to be any chance of reunification. Without such visitation, children are unable to develop a sense of safety, confidence, and trust. If the parents are uncooperative or unwilling to visit regularly and accept parental responsibility, social workers should expeditiously move toward adoption by gathering the necessary materials for terminating parental rights. Prolonged stays in foster care and frequent changes in placements lead to the disorder suffered by the named plaintiffs all too frequently. As Dr. Gross testified, Robert's problems are fairly characteristic of other children in the foster care population. Based on the foregoing, the Court finds that the children in the District's foster care have been and continue to be irreparably harmed—psychologically, emotionally, and sometimes physically—by the inappropriate treatment they have received while in that care.

Those who are not in the District's custody but who have been the subject of reports of neglect have also been harmed. Dr. Stein's case reading contains examples of 11 cases for which reports were substantiated but no services provided. In the most extreme case, a child died after his mother failed to keep him on a heart monitor made necessary by his medical problems. Prior to releasing the child to his mother, the CFSD had been made aware of the mother's lack of contact with the child while he was hospitalized. The homicide detective's report, made after the child's death, noted that the mother's apartment was dirty, without running water, and was littered with drug paraphernalia. The child showed signs of having been choked. In less extreme cases, children are forced to live in filthy, rodent-infested homes that lack electricity or running water. They are often in the presence of drug use and are not fed regular meals. Based on the foregoing, the Court finds that those plaintiffs who have been the

subject of a report of neglect but remain in the home have been and continue to be harmed by the District's failure to provide preventive services.

C. Summary of Findings

To summarize, in the foregoing discussion, the Court found the following:

1. The average stay for children in the District's foster care system is 4.8 years, over twice the national average.

2. The CFSD has, since at least the beginning of 1988, continuously failed to initiate investigations into reports of neglect or abuse within 24 hours and complete investigations within two weeks.

3. The CFSD has consistently failed to use "reasonable efforts" to prevent the removal of children from their homes or to provide the services necessary to reunite them with their families when removal cannot be avoided.

4. Children in the CFSD's physical custody have consistently remained in voluntary or emergency care beyond 90 days without the filing of a neglect petition and beyond 180 days without a judicial determination that placement is in their best interests.

5. The CFSD has consistently failed to place children in the least restrictive placements in close proximity to their families and consistent with their needs.

6. The CFSD has frequently assigned children in its custody inappropriate case goals and has consistently failed to prepare written case plans to enable the children to realize their goals.

7. The CFSD has consistently failed to provide services once children are removed from the home and placed in foster care.

8. The CFSD has consistently failed to expedite the progression of children in its custody toward permanent place-

ment through adoption and has failed to timely refer children whose goal is adoption to the Adoption and Placement Resources Branch.

9. The CFSD has consistently failed to ensure that the children in its custody receive timely judicial and administrative reviews regarding the continued necessity and appropriateness of placement.

10. The CFSD's automated information system, the WARD Tracking System, is wholly inadequate for keeping track of the number and location of children in the District's custody and their needs.

11. The caseloads handled by CFSD social workers have consistently exceeded reasonable professional standards and prevented the CFSD from carrying out its responsibilities under federal and District law.

12. Extreme staff shortages have consistently resulted in CFSD supervisors carrying caseloads rather than training and monitoring their employees.

13. The CFSD's Monitoring Unit has consistently failed to monitor and inspect foster homes and institutions on a yearly basis.

14. The DHS has consistently failed to use its funding in the most cost-effective manner and has consistently failed to maximize its federal funding by failing to make the administrative changes necessary to qualify for such funding.

15. Each of the named plaintiffs, as well as the rest of the members of the plaintiff class, have been and continue to be psychologically, emotionally, and physically harmed by the actions and inactions of defendants.

16. Management personnel at all levels of the DHS, as well as the former mayor, have repeatedly been advised about the department's deficiencies and inability to comply with federal and local law.

17. The DHS's proposed realignment, although a positive step toward improvement, is still too tentative to moot this case or make injunctive relief unnecessary.

III.

CONCLUSIONS OF LAW

Plaintiffs bring their complaint under 42 U.S.C. § 1983, alleging that the District operates its child welfare system in violation of the federal Adoption Assistance and Child Welfare Act of 1980 and Child Abuse Prevention and Treatment Act, as well as the fifth amendment to the Constitution. Plaintiffs also allege that the District is violating its own statutes: the Prevention of Abuse and Neglect Act of 1977 and the Youth Residential Facilities Licensure Act of 1986. Plaintiffs seek injunctive relief only.

Section 1983 of Title 42 of the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

A. Standard for § 1983 Liability

The seminal case establishing that municipalities may be held liable under § 1983 is *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).[25] In that case, the Supreme Court held

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[25] It should be noted that, although the District of Columbia is not a named defendant in this action, the mayor is named in her official capacity. Because the mayor is, in essence, the individual embodiment of the District, the Court does not find that the failure to name the District as a defendant affects its analysis of the applicability of § 1983.

that although "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," it may be held liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. Defendants argue that the District cannot be held liable unless the alleged unconstitutional action " 'implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers.' " Defendants' Trial Brief at 9 (quoting *Monell*, 436 U.S. at 690 (1978)). Defendants ignore the next sentence of the *Monell* decision, however, which makes it clear that "local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U.S. at 690-91. What matters is that the policy or custom is "the moving force of the constitutional violation." *Id.* at 694.

This circuit has elaborated on the *Monell* inquiry, holding that to establish municipal liability under § 1983, a plaintiff must prove the existence of "a persistent, pervasive practice, attributable to a course deliberately pursued by official policy-makers, one that caused the deprivation of constitutional rights plaintiff experienced." *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986). The Court will use this legal standard to review the alleged statutory and constitutional violations in this case.

B. Alleged Statutory Violations

1. Applicability of § 1983

The Supreme Court has repeatedly held that § 1983 provides a federal remedy for violations of federal statutory rights as well as constitutional rights. *See Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, ——,

110 S. Ct. 444, 448 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The test for determining whether § 1983 provides a remedy for any particular statutory violation is two-part: first, "the plaintiff must assert the violation of a federal right," *see Golden State Transit Corp.*, —— U.S. at ——, 110 S. Ct. at 448, and second, Congress must not have specifically foreclosed the § 1983 remedy. *Id. See also Thiboutot*, 448 U.S. at 19. Whether a federal right has been violated depends upon whether the statute in question creates "obligations binding on the governmental unit" that are not " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce' " and that are " 'inten[ded] to benefit' the putative plaintiff." *Golden State Transit Corp.* —— U.S. at ——, 110 S. Ct. at 448 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32, 430 (1987)).

Defendants have argued that the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights under § 1983. This argument is contrary to existing law. In *Lynch v. Dukakis*, 719 F.2d 504 (lst Cir. 1983), the First Circuit applied the two-part test to alleged violations of the same statute at issue in this case, the federal Adoption Assistance Act. The court held that the Act confers enforceable rights upon children in the custody of states receiving federal funding under the Act. In so holding, the First Circuit relied on numerous Supreme Court decisions since 1968 that "implicitly and explicitly" have held that the rights under various provisions of the Social Security Act are privately enforceable under § 1983. 719 F.2d at 510 (citing cases). Having determined that the Adoption Assistance Act conferred an enforceable right, the First Circuit went on to determine that Congress had not foreclosed the § 1983 remedy by authorizing the Secretary of the Department of Health and Human Services to withhold or reduce federal funding under the Act when a state does not comply with its requirements. The court rejected the defendants' arguments that a cutoff in funding was the

sole remedy under the Act. Instead, the First Circuit held that the issue was governed by *Rosado v. Wyman*, 397 U.S. 397 (1970), in which the Supreme Court held that:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.

397 U.S. at 420.

More recently, the Fourth Circuit upheld the enforceability of the Adoption Assistance Act through § 1938 in *L.J., By and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989). The Fourth Circuit held that the provisions of the Act:

> spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. § 1983.

838 F.2d at 123. The court went on to uphold the district court's grant of a preliminary injunction ordering defendants to "submit a plan for review of foster homes about which a report of maltreatment has been made, to monitor child placements in foster homes at least monthly and in some instances weekly, to expand its medical services to foster children including the keeping of medical records, and to provide prompt written reports of maltreatment of foster children to their attorneys and the juvenile court . . . ." *Id.* at 120. *See also Lesher v. Lavrich*, 784 F.2d 193, 197 (6th Cir. 1986) (holding plaintiffs not entitled to damages for alleged violations of Adoption Assistance Act but agreeing

with *Lynch* that "[i]t may be reasonable to read the [Act] to permit parents and children affected by the programs it funds to sue to force those programs to comply with the federal funding requirements").

This Court finds the reasoning of the First and Fourth Circuits persuasive. It would strain logic to hold that plaintiffs, as the intended beneficiaries of the Adoption Assistance Act, nevertheless are precluded from enforcing their rights under the Act. Moreover, the provisions of the Act itself persuade the Court that the Act creates enforceable rights. These provisions are extraordinarily specific, spelling out exactly what a state must do for children in its care in order to receive funding under the Act. Based on this, the Court holds that the Adoption Assistance Act, by its terms, "creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce,' . . . is intended to benefit the putative plaintiffs, and is not foreclosed 'by express provision or other specific evidence from the statute itself.' " *Golden State Transit Corp.*, —— U.S. at ——, 110 S. Ct. at 449 (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432, 423 (1987)).

2. Defendants' Violations

Having determined that § 1983 is available to enforce rights conferred by the Adoption Assistance Act, this Court must determine whether the District, by virtue of an official policy or custom, has deprived plaintiffs of those rights. The Court has recited countless facts which undeniably establish that plaintiffs are being deprived of rights conferred upon them by the federal statute. In almost every area of the federal law, the District's child welfare system is deficient. It fails to investigate reports of abuse and neglect in a timely manner; it fails to provide services to children and families; it fails to make appropriate foster care placements; it fails to develop case plans; and it fails to assure a permanent home for the children in its care, among other things. The Court has already found that these failures have terrible conse-

quences for the children in the District's custody as well as for those who are known to the District because of reports of neglect or abuse. In one tragic case, these failures resulted in an infant's death. The Court has also found that the upper management of the DHS, as well as the former mayor, have been repeatedly made aware of most, if not all, of the system's failures. At one point, having been repeatedly advised that children were at risk due to severe staff shortages and excessive caseloads, the mayor promised to hire more social workers so that the CFSD could carry out its responsibilities. This promise never materialized.

Defendants have pointed out that the District's official policy is embodied in its statutes, which largely follow the mandates of the Adoption Assistance Act. Although the Court agrees that the District's statutes may be its "official policy," it does not represent the actual practice in the District. The court in *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983), addressed and rejected a similar argument. In that case, defendants argued that review was precluded because the Massachusetts statute and regulations were consistent with federal law. The court held that § 1983 applies to state "custom or usage" just as it does to state statutes. Therefore, the court held, "[i]f Massachusetts's practice is to deprive foster children of federal statutory rights, even though the state's law on the books requires otherwise, section 1983 is available as a remedy." 719 F.2d at 511. The situation is the same in this case. Based on the overwhelming evidence, the Court can conclude nothing less than that the District's failures amount to a "persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers." *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986). Accordingly, the Court holds that the District has been and continues to be depriving plaintiffs of federal statutory rights in violation of § 1983 of Title 42 of the United States Code.

C. Alleged Constitutional Violations

1. The Need to Reach the Constitutional Claims

Although the Court is mindful of the longstanding admonishment to refrain from reaching constitutional issues unnecessarily, the nature of the relief sought in this case makes a resolution of the constitutional claims of the children in the District's foster care unavoidable. By holding that the District has violated only these children's *statutory* rights, the Court is limited to granting only conditional relief. If the District decides to simply forego federal funding under the Adoption Assistance Act, the Court would have no basis for enforcing any injunction it might order. This limitation was noted by the district court in *Lynch v. King*, 550 F. Supp. 325 (D. Mass. 1982), *aff'd*, *Lynch v. Dukakis*, 719 F.2d 504 (lst Cir. 1983). In that case, the court issued a preliminary injunction ordering the state to provide written case plans, ordering a cap on the number of cases a social worker can have at any time, and ordering other specific relief. The district court noted, however, that the relief was limited to "an order compelling state officials to give up some of those resources—funds appropriated by Congress—if federal requirements are not met." 550 F. Supp. at 327.[25] *See also Rosado v. Wyman*, 397 U.S. 397, 420 (1970) (holding that plaintiffs who challenged the state's plan for making

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[25] Despite the limit of this relief, the court in *Lynch* chose not to address plaintiff's constitutional claims at that time. It held, however, that "[i]f defendants choose not to participate in the program for supplemental funds . . ., or fail to submit a revised plan demonstrating their compliance with the requirements of [the Act], they will be restrained from spending supplemental funds allotted under [the Act]. In addition, plaintiffs may apply to the court for a hearing on their constitutional claims." 550 F. Supp. at 354. Unlike this case, which has proceeded through a full trial on the merits, the decision in *Lynch* was made at the preliminary injunction stage, after which the parties entered into a settlement.

In the more recent decision in *L.J. By and Through Darr v. Massina*, No. 84-4409 (July 27, 1987) (reprinted as Addendum B to *L.J. By and*

[Footnote continued on next page]

payments pursuant to the federal Aid to Families with Dependent Children program were entitled to declaratory relief and an appropriate injunction against the payment of federal monies if the state did not develop a plan that conformed with the statute in a reasonable amount of time, but noting that the state is free to use only state funds according to whatever plan it chooses, providing it does not violate the Constitution).

If this Court orders relief for the District's statutory violations only, the District could simply give up its federal payments in order to relieve itself of a burdensome court order. Plaintiffs would then be left with no effective relief. Because the Court may grant only conditional relief for defendants' statutory violations, the Court will proceed to reach plaintiffs' constitutional claims.

2. The Legal Standard

Plaintiffs allege that they are being deprived of their due process rights under the fifth amendment, including: (1) the right not to be harmed while in state custody, (2) the right to placement in the least restrictive, most appropriate placement, (3) the right to care that is consistent with competent professional judgment, and (4) the right not to be deprived of state or federally created liberty or property rights without due process. Complaint at ¶ 130. As the Court has previously articulated, to establish a constitutional violation under § 1983, plaintiffs must prove that the alleged unconstitutional

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[Footnote continued from previous page]
Through Darr v. Massina, 699 F. Supp. 508 (1988)), *aff'd*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), the Maryland district court was not so reluctant to address the constitutional issues at the preliminary injunction stage. That court first established that defendants, including the Baltimore City Department of Social Services (BCDSS), had a constitutional duty to protect the children in the city's foster care custody. The court then held that due to the "systemic nature of the BCDSS failure to perform that duty," the plaintiffs were likely to succeed on the merits of their constitutional claims. Slip op. at ——, 699 F. Supp. at 539-40.

action amounts to an official policy or custom and that a causal link exists between the policy or custom and the alleged harm. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987); *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986).

Before the Court can apply this standard to the facts of this case, it must determine whether defendants' actions or nonactions are indeed unconstitutional. This issue has never been conclusively determined by any of the district courts or circuits that have entertained similar child welfare suits.

The biggest obstacle to plaintiffs' constitutional claims is the case of *Deshaney v. Winnebago County Dept of Social Services, et al.*, 489 U.S. 189, 109 S. Ct. 998 (1989). The case involved a young boy who was not in the state's custody but had been brought to the state's attention through reports of abuse. After the state social services agency became aware of the boy and established a "Child Protection Team" to recommend measures for his protection, the boy's father beat him so severely that he will require institutionalization for the rest of his life. The boy's mother sued under § 1983 on his behalf, arguing that the state had acquired a duty to protect her son because it knew of the danger of abuse to him and had undertaken efforts to provide for his protection. Having entered this "special relationship" with the boy, the mother argued that the state had a duty to protect him competently.

The Supreme Court rejected these arguments, holding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. at ——, 109 S. Ct. at 1003. The Court reiterated its prior holdings that the due process clause does not confer an affirmative right to governmental aid. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

Deshaney is distinguishable from the case at bar for two reasons. First, the Court in *Deshaney* acknowledged that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at ——, 109 S. Ct. at 1005. The Court continued by noting that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id.* at —— n.9, 109 S. Ct. at 1006 n.9. Clearly this is the situation for the plaintiffs in this case who have entered into the District of Columbia's custody.

The second distinguishing factor is that the plaintiffs in this case argue that the District's statutes and policies create constitutionally protected liberty and property interests. The District's violation of these statutes and policies, so their argument goes, violates the due process rights of the children in foster care. This argument was not considered by the Supreme Court in *Deshaney* because it had not been pleaded in the courts below. *See* 489 U.S. at —— n.2, 109 S. Ct. at 1003 n.2 (noting that the entitlement argument was made for the first time in petitioners' Supreme Court brief and thus declining to consider it). Whether either of these distinguishing factors opens the door to holding the District liable for constitutional violations depends upon the scope of plaintiffs' liberty interests and the scope of the defendants' duty to prevent the deprivation of those interests.

a. Scope of Plaintiffs' Liberty Interests

Plaintiffs' Constitutional claims are brought pursuant to the fifth amendment to the Constitution, which is applicable to the District of Columbia in the same way as the fourteenth amendment is applicable to the states. The fifth amendment protects persons from being deprived of liberty interests

without due process of law. Plaintiffs have asserted that they have liberty interests in freedom from harm while in state custody, placement in the least restrictive, most appropriate foster care placements, and receiving care that is consistent with competent professional judgment.

It is indisputable that plaintiffs have a liberty interest in safe conditions while in state custody. Even convicted criminals subject to state or federal punishment have an interest in their physical security. *See Hutto v. Finney*, 437 U.S. 678 (1978). Although the scope of plaintiffs' liberty interest is not entirely clear, the Supreme Court has indicated that it is broader for those in the civil custody of the state than for those in the state's criminal custody.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), plaintiff, an involuntarily committed mentally retarded adult, complained that he had suffered repeated injuries and had been subjected to physical restraints while in the state's custody. The Supreme Court held that the plaintiff had liberty interests in reasonably safe conditions and freedom from bodily restraint. *Id.* at 315-16. The Supreme Court then turned to plaintiff's claim that he had a right to minimal training in the development of necessary skills. The Court noted that although a state has no general constitutional duty to provide substantive services to its citizens, *see Harris v. McRae*, 448 U.S. 297, 318 (1980), *Maher v. Roe*, 432 U.S. 464 (1977), a duty may arise when a person is in the state's custody and is dependent upon the state for care. *Youngberg*, 457 U.S. at 317. The Supreme Court then held that the plaintiff's liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319. The Court did not need to resolve "the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom." *Id.* at 318 (footnote omitted).

The Court finds the rights of children in foster care to be analogous to the rights of the involuntarily committed. That is, they have a right to reasonably safe placements in which they will not be harmed.[27] This right is not limited to safety from physical harm, although there are certainly instances in which the plaintiffs in this case have been physically harmed. This right extends to safety from psychological and emotional harm. *See Carey v. Piphus*, 435 U.S. 247 (1978) (mental and emotional distress is a cognizable injury under § 1983). *See also Deshaney*, 489 U.S. at ——, 109 S. Ct. at 1005 (once in custody, state has constitutional "duty to assume some responsibility for [a child's] safety and general well-being"). Whether plaintiffs have a liberty interest in any specific services is a more difficult question, analogous to the question of training addressed by the Supreme Court in *Youngberg*. In addressing this question, it is important to keep in mind that plaintiffs did not come into the District's care by choice. They are wards of the District who rely wholly on the District to provide them with all of life's necessities. They are children

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[27] This holding is supported by the decisions of the District Court of Maryland and the Fourth Circuit. In *L.J. By and Through Darr v. Massina*, No. 84-4409 (July 27, 1987) (reprinted as Addendum B to *L.J. By and Through Darr v. Massina*, 699 F. Supp. 508 (1988)), *aff'd*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), the district court held that the defendants, including the Baltimore City Department of Social Services, had entered into a "special relationship" with the children in the city's foster care custody. By virtue of this special relationship, defendants had acquired an affirmative duty to protect the plaintiff foster children. The court went on to hold that the systemic nature of defendants' failure to carry out its duty warranted preliminary injunctive relief.

On appeal, the Fourth Circuit held it unnecessary to reach the merits of plaintiffs' constitutional claims but it noted that "[d]efendants do not seriously contend with respect to prospective relief that if plaintiffs prove their allegations, which they have already demonstrated have an arguably solid foundation, plaintiffs will have proven a violation under the Fourteenth Amendment." 838 F.2d at 122. Plaintiffs in *L.J.*, like the plaintiffs in this case, had alleged that systemic deficiencies in the city's foster care system violates the Adoption Assistance Act and the Constitution and resulted in irreparable harm to the city's foster children.

and rely on the District to protect them from harm and ensure their well-being. To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, this Court holds that the children have a constitutional liberty interest in those services. This delimitation of the scope of plaintiffs' liberty interest is consistent with the decision in *Youngberg*, wherein the Supreme Court limited the plaintiff's liberty interest in training to just that training necessary to ensure his safety and freedom from bodily restraint.

Plaintiffs' interests also derive from the District's own statutes and regulations, which provide precise directives to the DHS for the operation of its child welfare system. To the extent these statutes and regulations confer benefits upon the plaintiffs in the District's foster care, the deprivation of those benefits takes on constitutional dimensions. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Supreme Court held that the requirements of procedural due process apply to deprivations of liberty and property interests. According to the Court, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

The Eleventh Circuit relied in part on *Roth* to reverse a district court's dismissal of a foster child's § 1983 complaint in *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989). In that case, the appellate court determined that the Georgia statutes regarding foster care and placement conferred benefits upon children in the care of the state. Specifically, the court held that

> [T]he Georgia scheme mandates that officials follow guidelines and take affirmative actions to ensure the

> well being and promote the welfare of children in foster care. These children can state a claim based upon deprivation of a liberty interest in personal safety when the officials fail to follow this mandate.
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> . . .
>
> It is no moment that the state officials are not charged in this case with affirmatively acting to harm this child. What the child is entitled to is the state's protection from harm. She is entitled to be protected in the manner provided by statute. It would be anomalous if the state, in allegedly acting to protect the child, could itself cause harm to the child by failing to assume the child's minimal safety. Failing to act may, under certain circumstances, be more detrimental than acting.

818 F.2d at 799-800. The Georgia statutes at issue in *Taylor* provided a comprehensive scheme governing the state's foster care system. The District's statutes are also comprehensive, requiring the following, among other things: investigations of neglect within 24 hours, D.C. Code Ann. § 6-2102(b); preparation of a plan for each child and family for whom there is a substantiated report of neglect, *id.* at § 6-2107; limited 90-day stays in emergency placement, *id.* at § 6-2123; placements in the "least restrictive" settings, "consistent with the best interest and special needs of the child," CFSD Manual of Operations at § 602.5(a); and the licensure and yearly inspection of youth residential facilities, including foster homes, D.C. Code Ann. at § 3-802(1). *See also* part I, *supra* (outlining mandates of federal and District statutes).

The Eleventh Circuit's reasoning in *Taylor* provides compelling support for this Court's definition of the scope of the liberty interests of the plaintiffs who are in the District's foster care custody. The Court is reluctant, however, to rely wholly on the District's statutes as the source of constitutional liberty interests for those plaintiffs who are not in the District's custody.[28] The Court recognizes that this issue was

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[28] Although many of the plaintiffs in this case are in the District's custody, others remain in the home or in the care of friends or relatives [Footnote continued on the next page]

explicitly left open by the Supreme Court in *Deshaney v. Winnebago County Dep't of Social Services, et al.*, 489 U.S. 189, 109 S. Ct. 998 (1989), which made it clear that the state does not have a general constitutional duty to protect the liberty interests of children who are not in its custody. Without further guidance, the Court is unwilling to hold that the District has acquired such a duty solely by virtue of its own statutes and regulations. Nevertheless, it is without question that the District has neglected its *statutory* duties, under both federal and local law, to all of the children in the plaintiff class, including those who are not in the District's foster care custody.

b. Scope of Defendants' Constitutional Duty

In *Youngberg v. Romeo*, 457 U.S. 307 (1982], the Supreme Court held that determining whether the plaintiff's constitutional rights have been violated requires balancing the plaintiff's liberty interests against any relevant state interests, including fiscal constraints and administrative burdens. *Id.* at 321. The standard for conducting this balancing is not whether the state's interest is "compelling" or "substantial,"

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after having been the subject of a report of abuse and neglect. The plaintiff class is defined as:

> All children who, as the result of alleged or suspected abuse or neglect, are in the legal and/or physical custody of the District of Columbia Department of Human Services; and the presently-identifiable children who are not in the Department's legal or physical custody but who have been the victims, or are at risk, of negect or abuse of which the Department knows or should know as a result of notice to or filings with the Department; not including, however, any member of the class certified in *Bobby D. v. Barry*, Civil Action Misc. No. 16-77 (D.C. Super. Ct. July 7, 1980), who remains in the foster-care custody of the Department of Human Services, with respect to those issues addressed by the judgment entered in that action.

LaShawn A. et al. v. Barry, et al., No. 89-1754, Order Granting Class Certification (January 22, 1990).

but whether the state exercised professional judgment in choosing what action to undertake. It is not for the court to " 'specify which of several professionally acceptable choices should have been made.' " *Id.* at 321 (quoting the Third Circuit's opinion in the same case, 644 F.2d 147, 178 (3d Cir. 1980)). Rather, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. Under this standard, the Constitution places a duty upon state agencies to exercise professional judgment when carrying out their responsibilities. The Supreme Court acknowledged in a footnote that expert testimony may be relevant for determining whether an agency's decisions substantially depart from the requisite professional judgment. *Id.* at 323 n.31.

The *Youngberg* case began its journey to the Supreme Court when the district court instructed the jury that they could hold defendants liable only if they found defendants to be "deliberately indifferent" to the serious medical and psychological needs of the plaintiff. This "deliberate indifference" standard was adopted by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), a case involving prisoners' rights to be free from "cruel and unusual" punishment under the eighth amendment. After the jury found defendants liable, the case was appealed to the Third Circuit, which reversed and remanded, holding that the eighth amendment standard was inapplicable. The Third Circuit, however, could not agree on the appropriate standard for review. Recognizing the importance of this question, the Supreme Court granted certiorari. The Supreme Court then adopted the "professional judgment" standard set forth above, holding that the district court had erroneously instructed the jury on the eighth amendment deliberate indifference standard.

Since *Youngberg*, two circuits have had the occasion to consider the two standards in the context of cases involving children in state custody. In *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782 (2d Cir.), *cert. denied sub nom., Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983), the Second Circuit reversed the district court's grant of a J.N.O.V. after a jury returned a verdict in favor of a plaintiff who had been physically and sexually abused by her foster father. The Second Circuit held that government officials could be held liable under § 1983 for inaction, as well as for affirmative action, in violation of law. In its first decision, prior to the Supreme Court's decision in *Youngberg*, the Second Circuit held that deliberate indifference was a prerequisite to § 1983 liability. 649 F.2d at 141. In its second decision, after remand and after *Youngberg*, the Second Circuit acknowledged that the Supreme Court had articulated a different standard for institutionalized plaintiffs. Because the appeal had been brought by the defendants, however, the court did not have to determine which standard to apply. The court instead noted that "[e]ven if the [*Youngberg*] standard of liability is applicable outside of an institutional setting, it is not more favorable to the [defendants] than the deliberate indifference test that was applied . . . . Consequently, we reject the [defendants'] assertion that the [*Youngberg*] decision has effected a change in the controlling law so as to make our prior decision clear error . . . ." 709 F.2d at 790. Because the Second Circuit was not presented with an opportunity to decide whether *Youngberg* applies to children in foster care, this Court does not find its decision controlling.

In *Taylor By and Through Ledbetter*, 818 F 2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), decided well after *Youngberg*, the Eleventh Circuit again applied the deliberate indifference standard to a § 1983 case involving a child in foster care. The court, in reversing in part the lower court's dismissal of the complaint, held that a child in foster care may prevail under § 1983 "only where it is alleged and

the proof shows that the state officials were deliberately indifferent to the welfare of the child." 818 F.2d at 797. At the same time, the Court acknowledged the similarities between the liberty interests of a child in foster care and the liberty interests of the plaintiff in *Youngberg*. The court specifically declined to address the merits of the child's claim, stating that "[w]hether the child's claim constitutes a liberty interest protected by the due process clause when weighed against the demands of society will be determined at later stages in these proceedings." 818 F.2d at 795. This Court finds the *Taylor* opinion to be ambiguous. Because the Eleventh Circuit did not explain the relationship between the *Youngberg* standard and the "deliberate indifference" standard, the Court finds little guidance in its decision.

Faced with no clear precedent, it is for this Court to determine whether the *Youngberg* professional judgment standard applies to children in the state's foster care custody. The Court finds plaintiffs in this case to be in a much closer position to the plaintiff in *Youngberg* than to an incarcerated prisoner. As the *Youngberg* decision recognizes, the rights of a person in the civil custody of the state are greater than the rights of a person in the state's criminal custody. The foster children that make up the plaintiff class in this case have done society no wrong and they deserve no punishment. It would be inappropriate to force them to endure constitutional deprivations absent a showing of "deliberate indifference" by their caretakers. At the same time, it would be inappropriate to hold caretakers liable for constitutional deprivations when those caretakers had exercised their professional judgment in determining the best course of conduct. Thus, this Court will judge the defendants' liability based on whether they have exercised competent professional judgment in the administration of the District's child welfare system.[29]

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[29] The Court is also persuaded to reach this conclusion based on the nature of this case. This is not a case like *Doe* or *Taylor* in which the plain-

[Footnote continued on the next page]

3. Defendant's Violations

The Court has held that the plaintiffs in the District's foster care have liberty interests in personal safety and freedom from harm. The facts of this case establish beyond any doubt that defendants have failed to protect these plaintiffs from harm—whether physical, psychological, or emotional—by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things. Plaintiffs have established these failures in the same way they established defendants' statutory violations: through the experts' reports and testimony, the histories of the named plaintiffs, various DHS documents and reports, the testimony of high-level DHS officials, and the defendants' own admissions.

The defendants have admitted that, for certain periods of time, up to 75 percent of the children in voluntary or emergency care had been in that status for longer than 90 days without the filing of a neglect petition. This status is a form of legal limbo, in which children are suspended with no efforts made to reunite them with their families or to place them in permanent adoptive homes. The defendants have admitted that the CFSD's social workers are unable to closely monitor families or make regular visits to the children for whom they are responsible. This widespread deficiency contributes to the CFSD's perpetual state of crisis. The defendants have admitted that the CFSD does not have adequate medical screening facilities for children coming into its care. The risk of harm to these children, as well as to those

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[Footnote continued from the previous page]
tiff seeks money damages. In such cases, a deliberate indifference standard may be warranted due to the chilling effect that an unfavorable judgment may have on municipal policymakers. Plaintiffs in this case seek injunctive relief only. In seeking such specific relief, it is particularly appropriate to consider whether the treatment plaintiffs are currently receiving is the result of competent, professional decisionmaking.

they may be placed with, is unacceptable. The defendants have admitted that the CFSD often fails to refer children for adoption even when all hope for family reunification is gone. In at least one case, the CFSD lost a relinquishment agreement, signed by a neglected child's natural mother, that would have freed the child for adoption and paved the way for a permanent family. That child remains in the District's custody. The defendants have admitted that the CFSD has no reliable automated means of tracking the location of children in its care. When a child is referred for placement, a social worker must start calling foster homes to determine whether they have a vacancy. The defendants have admitted that the CFSD does not regularly inspect the foster homes and institutions in which its wards are placed. This failure has no doubt contributed to the instances of physical abuse that the evidence has shown to occur within some of these facilities.

In the Court's view, the defendants' own admissions have established their liability. That the system's outrageous deficiencies may be the result of staff shortages and excessive caseloads is no help to defendants, whose knowledge of these problems and refusal to take action confirm that the problems are not isolated incidents, but amount to "a persistent, pervasive practice." The behavior of the defendants also confirms that the decisions made by officials within the DHS have not been the result of the exercise of professional judgment. Plaintiffs' experts, whose testimony was uncontroverted, established that the District has failed to comply with reasonable professional standards in almost every area of its child welfare system. The testimony of defendants' own witnesses, several of which are named as defendants, often did little more than support this conclusion. Their candidness in admitting the system's failures makes it all the more clear that these failures are not the result of choosing among

several professionally acceptable alternatives. These failures are the result of making no choices at all.[30]

Under *Youngberg*, if defendants have exercised professional judgment in carrying out their constitutional duties, the Court is to balance plaintiffs' liberty interests against any relevant state interests. In this case, however, the Court has determined that defendants have failed to exercise professional judgment almost as egregiously as they have failed to carry out their constitutional duties. Because of this, defendants' arguments about fiscal constraints are unavailing. The Court is well aware of the District's financial plight, but this cannot relieve the District of liability for depriving the children in its foster care of their constitutionally protected liberty interests.

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[30] The Court notes that although it has applied the professional judgment standard to this case, the result would have been the same had it used the deliberate indifference standard. The evidence clearly establishes that the Barry Administration was aware since at least 1987 of the serious deficiencies in the child welfare system. Despite this knowledge, the administration did virtually nothing to improve the dire situation within the CFSD. The former mayor was warned that children were at risk due to the lack of social workers and the excessive caseloads those workers handled. At the time of trial, the CFSD was still barely over half-staffed and social workers still carried caseloads well in excess of professional standards and the division's own policy. The former mayor was warned that the CFSD lacked an information system capable of tracking the number and location of children in its care. At the time of trial, the CFSD had no new system capable of tracking this essential information. The former mayor was informed that the District was losing millions in federal financing due to administrative and procedural shortcomings. At the time of trial, the CFSD had not instituted any program for maximizing federal revenues and continued to forgo millions in federal reimbursements. The list could go on and on, with each of the District's shortcomings representing another failure in its duty to protect the children in its care. The lack of action by the Barry Administration to remedy the system's defects and properly provide for the plaintiff children represents no less than deliberate indifference toward the constitutional rights of these children. That the new mayor and her administration may have the intent to institute reforms cannot alter this conclusion unless that intent is transformed into concrete action or, at the very least, a concrete plan for action.

The Court also concludes that plaintiffs have established the causal link between defendants' constitutional violations and the injuries suffered by the District's foster care children. The testimony and reports of Dr. Stein and plaintiffs' other experts demonstrate that most of the children in foster care will acquire or exacerbate permanent psychological disorders such as the "Attention Deficit Hyperactivity Disorder" exhibited by each of the named plaintiffs who was examined. The case histories of the named plaintiffs reveal the emotional harm these children have suffered, to the point of attempting suicide, by virtue of the failure of the system to either reunite them with their families or find them adoptive families who will care for them. The case histories also reveal the physical abuse these children have endured by virtue of the system's failure to provide for their safety. This is not a case of attempting to protect plaintiffs' interests and failing; this is a case where all too often no attempt is ever made. The Court views the evidence in this case as nothing less than outrageous. The District's dereliction of its responsibilities to the children in its custody is a travesty. Although these children have committed no wrong, they in effect have been punished as though they had. Based on the foregoing, the Court holds that defendants have deprived the children in the District's foster care of their constitutionally protected liberty interests in violation of § 1983.

IV.

CONCLUSION

The Court has thoroughly reviewed the evidence before it and has carefully examined the law. Whatever the limits of the District's ability to provide for the children in its custody, it is clear that the District is statutorily and constitutionally compelled to do more than it is doing now. For these reasons and all of the reasons in the preceding discussion, the Court holds that defendants have violated § 1983 of Title 42 of the

United States Code by depriving plaintiffs of their statutorily and constitutionally conferred rights.

DATED: APRIL 18, 1991

/s/ Thomas F. Hogan

THOMAS F. HOGAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 89-1754

LASHAWN A., *et al.*
Plaintiffs,

v.

SHARON PRATT DIXON, *et al.*,
Defendants..

ORDER

On August 26, 1991, the Court conducted a fairness hearing on the parties' Joint Motion for Entry into Judgment of Remedial Order. The Court heard testimony from the legal representatives of several class members as well as experts in the field of child welfare and social work. The Court considered the comments proposed by the interested parties, both orally and in writing. In accordance with the findings of fact and conclusions of law set forth by the Court at the hearing, and incorporating the Court's Memorandum Opinion of April 18, 1991, it is this 26th day of August, 1991,

ORDERED that the parties' motion be and hereby is GRANTED and the Court enters into judgment the Proposed Remedial Order submitted by the parties on August 14, 1991.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

FILED AUGUST 27, 1991

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 4, 1992 Decided April 16, 1993

No. 91-7159

LaShawn A., by her next friend, Evelyn Moore, *et al.*,
Appellees

v.

Sharon Pratt Kelly, *et al.*, Appellants

Appeal from the United States District Court
for the District of Columbia

Civil Action No. 89-1754

Beverly J. Burke, Deputy Corporation Counsel, for appellants. *John Payton*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Donna M. Murasky*, Assistant Corporation Counsel, were on the brief for appellants.

Marcia Robinson Lowry, with whom *Christopher J. Dunn*, *Elizabeth Symonds*, and *Arthur B. Spitzer* were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge*; SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: This is a review of a decision by the district court in favor of a group of unfortunate children who brought a class action suit for injunctive relief against various officials of the District of Columbia. The plaintiffs brought the class action on behalf of children who are in foster care under the supervision of the District of Columbia Department of Human Services ("DHS"), as well as children who are reported to be abused or neglected but are not yet in the care of the DHS.

The children attacked a child-welfare system which they alleged is characterized by ineptness and indifference, inordinate caseloads and insufficient funds. The district court found that, because of the appalling manner in which the system is managed, children remain subject to continuing abuse and neglect at the hands of heartless parents and guardians, even after the DHS has received reports of their predicaments. The court also found that youngsters who have been taken into the custody of the District's foster-care system languish in inappropriate placements, with scarce hope of returning to their families or being adopted. The court held that the District of Columbia's treatment of the children violated the Constitution and federal and local statutes.

After trial, the parties negotiated a remedial order that seeks to ease the plight of children who depend on the DHS for protection and for the opportunity to live and grow in a stable and nurturing environment. In the remedial order, the District of Columbia expressly reserved the right to appeal the district court's judgment assessing liability against it. The District's appeal from this judgment raises some complex constitutional and federal statutory issues. Because District of Columbia law is an independent and sufficient basis to support the district court's decision, however, we need not reach these issues in order to uphold the district court's resolution of this case.

I. BACKGROUND

It is not necessary to recount at length the complex background of this case, nor to recapitulate the extensive list of allegations against the District officials that the district court found to be based in fact. For the details as to these matters, we refer to Judge Thomas F. Hogan's clear and comprehensive discussion in the opinion below. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 961–87 (D.D.C. 1991). Suffice it to say that the district court found that the District of Columbia Department of Human Services ("DHS"), the agency entrusted with the care of foster children and abused and neglected children, has consistently evaded numerous responsibilities placed on it by local and federal statutes. Among the agency's transgressions are:

> [T]he failure of the DHS to initiate timely investigations into reports of abuse or neglect, the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

LaShawn A., 762 F. Supp. at 960.

The district court held, as to the children already enmeshed in the foster-care system, that the practices of the DHS deprived them of their due process rights under the Fifth Amendment to the United States Constitution. The court also found that the challenged actions and non-actions of the DHS violated two federal statutes: the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–627 and §§ 670–79, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106. The court held the defendants liable under 42 U.S.C. § 1983 for both the constitutional and federal statutory violations.

The children also raised pendent claims that the defendants had violated the District of Columbia's statutory and regula-

tory law, namely the Prevention of Child Abuse and Neglect Act of 1977, D.C. Code Ann. §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, and §§ 16-2351 to -2365 ("Abuse and Neglect Act"); the Youth Residential Facilities Licensure Act of 1986, D.C. Code Ann. §§ 3-801 to -808 ("Licensure Act"); and the Child and Family Services Division ("CFSD") Manual of Operations (September 1985). The district court found that the defendants had violated these acts and regulations, but it did not hold that the children possessed an explicit or implied private cause of action under District law to enforce these statutes. Instead, it held that the District's laws conferred constitutionally protected liberty and property interests on the children, the deprivation of which, without due process, was actionable under § 1983.

On appeal, the District officials assert that the district court erred in finding that the administration of the city's child-welfare and foster-care system violated the due process clause of the Fifth Amendment. They further contend that *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), which the Supreme Court decided after the district court decided the present case, forecloses any federal statutory cause of action. As we will explain, it is not necessary for us to confront these constitutional and federal statutory issues, for the district court judgment is completely supportable on the grounds of local law.

II. ANALYSIS

A. Abstention

As an initial matter, we must address the District officials' contention that under principles of *Younger v. Harris*, 401 U.S. 37 (1971), the district court should have abstained from deciding a large portion of this case. Appellants assert that *Younger* applies as to children within the foster-care system because these children are parties to ongoing proceedings in the Family Division of the Superior Court of the District of Columbia where their claims could have been resolved. (Appellees do not urge *Younger* abstention as to the claims of children who are reported to be abused or neglected but who

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are not yet in foster care, because these children are not yet parties to Family Division proceedings.) This Court has never decided whether the District of Columbia is a state for *Younger* abstention purposes. Instead, every time the question has arisen, we have assumed that the doctrine applies to the District and nonetheless determined, in light of the facts of each particular case, that *Younger* abstention has not been appropriate. *See, e.g., District Properties Assocs. v. Dist. of Columbia*, 743 F.2d 21, 28 n. 4 (D.C. Cir. 1984); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 n. 7 (D.C. Cir. 1984). In the present case, we again find it unnecessary to reach the issue, because *Younger* abstention would not be required here even if the doctrine applied to the District with full force.

In *Younger* and its progeny, the Supreme Court has established that federal courts may not interfere with pending state judicial or administrative proceedings. Although the Supreme Court has extended *Younger* abstention well beyond its original application to pending state criminal proceedings, the Court has never abandoned the core principle that the doctrine is applicable only "if the [federal] plaintiffs 'had an *opportunity* to present their federal claims in the state proceedings.'" *Moore v. Sims*, 442 U.S. 415, 425 (1979) (quoting *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis in original)). The notions of comity underlying *Younger* abstention do not compel federal courts to refrain from hearing federal statutory and constitutional claims when the pending state proceeding is an inadequate or inappropriate forum for pursuing these claims.

This Court has previously applied this principle in a case concerning the Family Division of the D.C. Superior Court. *Family Div. Trial Lawyers of Superior Court–D.C., Inc. v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), involved the constitutional claims of three attorneys who regularly requested assignment of cases in the Family Division. In federal district court, the attorneys unsuccessfully challenged the practice by which the D.C. Superior Court appointed counsel to represent indigent parents in neglect proceedings without reimbursement. They appealed the adverse decision to this

Court. Before this Court, the appellees argued that the district court should have abstained from deciding the merits of the appellants' claims, because these claims could have been raised and adequately dealt with in the individual neglect cases in which the appellants were counsel.

This Court rejected the appellees' abstention argument. It questioned "the need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts." 725 F.2d 695, 702 (D.C. Cir. 1984). Instead, the court focused on whether the federal plaintiffs were "parties to any pending suit in the local courts in which their constitutional challenges could *naturally* be resolved." *Id.* at 702 (emphasis added). The panel observed that "the individual neglect cases in which the appellants are counsel are questionable vehicles at best for raising their constitutional claims." *Id.* at 703. Consequently, it concluded that *Younger* abstention was not applicable.

Proceedings in the Family Division are an equally questionable vehicle for adjudicating the claims raised in the present case. There are three types of Family Division proceedings that may be "pending" for a child entangled in the District of Columbia's foster-care system: (1) a "neglect proceeding" adjudicating a neglect petition filed by the Corporation Counsel against the child's parents, (2) periodic review hearings, and (3) proceedings adjudicating motions to terminate parental rights. None of these proceedings is an appropriate forum for this multi-faceted class-action challenge to the District of Columbia's administration of its entire foster-care system.

Neglect proceedings are designed to focus on the special problems surrounding the neglect or abuse of a child by his or her parent, guardian, or custodian. The Family Division of the D.C. Superior Court has recognized that these proceedings are not suitable arenas in which to grapple with broad issues external to the parent-child relationship:

> By their very nature neglect proceedings contemplate issues centering on the care of a child by his or her parent. If need be "related matters involving the same

> family or household" can be consolidated. [D.C. Superior Court Rules Governing Neglect Proceedings Rule 2 and 3(b).] Anything broader is inconsistent with the nature of the proceedings.

In the Matters of N.P. and L.W., Nos. 404–79, 418–79 (D.C.Super.Ct. June 14, 1982), slip. op. at 2–3, *quoted in Family Div.*, 725 F.2d at 703.

The other two types of proceedings that are pending for some of the children—review hearings and termination proceedings—are even less suitable arenas in which to present the claims the children advance in this case. The Family Division is required to provide each child in the foster-care system with a review hearing either every six months or every year, depending on the child's age and the amount of time he or she has been within the system. D.C. Code Ann. § 16–2323(a). The review hearing is no broader in scope than the neglect proceeding. It is clearly intended merely to reassess periodically the disposition of the child.

The Family Division has explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law. In *In re Brim*, No. 489–80 (D.C. Super. Ct. July 20, 1984), the Family Division denied a motion by two children for injunctive relief against the D.C. Department of Human Services for the Department's alleged mishandling of Social Security disability payments it collected on the children's behalf. The court noted:

> This motion—with the full panoply of remedies requested (such as an accounting, declaratory relief requiring promulgation of rules and regulations, establishment of trust funds, and a permanent injunction)—is simply not appropriately heard within the context of a review, pursuant to 16 D.C. Code 2323, to monitor the post-dispositional welfare of a neglected child.... [T]hese issues are properly raised in federal district court.

Id., slip op. at 2.

The only other proceeding available to children in the foster-care system is the termination hearing. *See* D.C. Code

Ann. §§ 16–2358–59. This proceeding, however, has an even more limited function than the neglect proceeding and review hearing. A termination hearing is held in response to a motion by a child (through counsel), or by the District of Columbia, to terminate the parental rights of the child's parents, guardians, or custodians. D.C. Code Ann. § 16–2354. The hearing is manifestly not intended to address subjects other than the cessation of parental rights, and the children's claims in this case are well outside its scope.

In sum, there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law. This holding squares with our decision in *District Properties Assocs. v. Dist. of Columbia*, 743 F.2d 21 (D.C. Cir. 1984). In *District Properties*, local landlords brought a class action suit broadly challenging, on constitutional and federal statutory grounds, the practices and procedures of the District of Columbia agency responsible for administering the District's rent control laws. They pursued their case in U.S. District Court, despite ongoing administrative and judicial proceedings in the District of Columbia. This Court reversed the district court's use of *Younger* abstention to bar the action. In language strikingly relevant to the present case, we stated:

> [T]he only possible ground for *Younger* dismissal in this case would be if [the ongoing District of Columbia proceeding] was the kind of local enforcement proceeding in which appellants could have had a full and fair opportunity to present their federal claims. But . . . appellants' claims are in a number of respects considerably broader than the claims they were able to assert in the proceedings in local courts or before the [Rental Accommodations Office]. And the relief they seek in this case is far broader than that which the local court could have granted in the administrative review proceeding. . . . There being no pending state enforcement proceedings that would have afforded appellants a full and fair opportunity

> to litigate their constitutional claims, the predicate for *Younger* abstention was simply absent in this case.

Id. at 28. For the same reasons, we refuse to hold that the district court should have abstained from deciding the present case. We proceed to the merits.

B. Challenges to the Child-Welfare and Foster-Care System

The district court adjudged the defendants liable "under 42 U.S.C. § 1983 for violating the federal and local statutory rights of all of the children in the plaintiff class and for violating the constitutional rights of those plaintiffs in the District of Columbia's foster care custody." *LaShawn A. v. Dixon*, 762 F. Supp. 959, 998 (D.D.C. 1991). Appellants attack the judgment so far as it rests on federal statutory rights. They argue that the Supreme Court's opinion in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), decided after the district court issued its ruling in *LaShawn*, renders the federal statutes at issue unenforceable under 42 U.S.C. § 1983. Appellants also challenge the constitutional basis of the district court opinion.

It is not necessary to reach the complex constitutional and federal statutory issues in this case. The District of Columbia's statutes and regulations provide a scheme for the protection and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction.

As outlined by the district court, the obligations of the District of Columbia Department of Human Services under the Abuse and Neglect Act, the Licensure Act, and the CFSD Manual of Operations parallel almost precisely the requirements contained in the relevant federal laws. Every claim supported by federal law is also supported by District law. *LaShawn A. v. Dixon*, 762 F. Supp. at 961–64. The DHS has violated District law as well as federal law by failing, for example, to initiate timely investigations into reports of abuse or neglect, to provide services to families in order to prevent the placement of children in foster care, to place those who

may not safely remain at home in appropriate foster homes and institutions, to develop case plans for children in foster care, and to move children into a situation of permanency.

As the district court framed its decision, local law did not provide an entirely independent ground for the judgment, because the court did not find that the local statutes themselves provided the children with an explicit or implied private right of action. Instead, the district court apparently decided that the District of Columbia's statutes and policies create constitutionally protected liberty and property interests for those children in the District's foster-care custody. "To the extent these statutes and regulations confer benefits upon the plaintiffs in the District's foster care, the deprivation of those benefits takes on constitutional dimensions." *LaShawn*, 762 F. Supp. at 993. The children thus had a cause of action under § 1983.

If, however, we determine that the district court's judgment can be supported entirely by reference to the law of the District of Columbia, as appellees argue, we need not enter the § 1983 thicket at all. The fact that the district court itself did not rest its decision on this basis is of no concern, for "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

We find that the District statutes create a private cause of action for children in foster care and for children reported to have been abused or neglected but not yet in the District's custody. As for the latter group, this matter was conclusively settled by the District of Columbia Court of Appeals in *Turner v. District of Columbia*, 532 A.2d 662 (D.C.App. 1987). In that case, a mother brought suit against the District of Columbia on behalf of her children for the city's failure to remove the children from their abusive father's home. The District of Columbia Court of Appeals found that the Abuse and Neglect Act provides a private remedy against the Dis-

trict for the special class of abused and neglected children protected by the statute:

> With respect to the District of Columbia . . . we hold that when [the Child Protective Services Division] received a report that the two Roddy children, who were specifically and individually identified, were being abused by their father, [the Abuse and Neglect Act] created a special relationship between the District and the two children. From that moment on, the District had a duty to take certain steps prescribed by the Act for the protection of those children. The District's breach of that duty is actionable under the special duty exception to the general rule [that the government's general duty to the citizenry at large is not enforceable by a particular individual].

Id. at 675.

Turner establishes that the children in the present case who are reported to be abused or neglected but who are not yet in the District's custody have a private right of action under the District's Abuse and Neglect Act. It therefore seems self-evident that this Act (which regulates the District's foster-care system as well as its child-abuse-response system) also creates privately enforceable rights for those children actually in the District's custody. It is generally recognized that the state owes a greater duty toward people in its custody than toward people still in the care of private actors. Indeed, in assessing duties imposed on the state by the United States Constitution (as opposed to duties imposed by state statutes), the Supreme Court has held that the state has a constitutional duty to assume responsibility for the safety and well-being of a person *only* when the state takes that person into its custody. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199–201 (1989).

It would strain logic to conclude that the District, through the Abuse and Neglect Act, has assumed a duty on behalf of children still in the private sphere, but not on behalf of those youngsters who are in its custody. We therefore hold that the Abuse and Neglect Act creates a private right of action for children in the foster-care system.

There is an additional basis in District law for the right of the children in foster care to sue to enforce the statutes at issue. The other District of Columbia statute relied on by appellees, the Youth Residential Facilities Licensure Act, explicitly provides these children with a private cause of action. This act regulates Youth Residential Facilities, which it defines to "include, but not necessarily be limited to, foster homes, youth shelters, runaway shelters, emergency care facilities, youth group homes, supervised apartments, and residential treatment centers." D.C.Code Ann. § 3–801(9)(B).

Unquestionably, every child entangled in the D.C. foster-care system is situated in a facility covered by this provision. The act goes on to grant every resident of one of these facilities a private right of action:

> Notwithstanding the availability of any other remedy, a resident, any person acting on or in behalf of a resident, or the licensee or administrator of a facility may bring an action in court for mandamus to order the Mayor, a District government agency, or the youth residential monitoring committee to comply with this chapter, a rule issued pursuant to this chapter, *or any other District law relevant to the operation of the facility or the care of its residents.*

D.C.Code Ann. § 3–808(d)(1) (emphasis added).

In other words, the Licensure Act permits children in foster care to sue to enforce not only the requirements of the Licensure Act itself, but also all of the provisions of the Abuse and Neglect Act related to "the care" of these children. This broad language encompasses all the provisions that the appellants are alleged to have violated.

In sum, under District of Columbia law, every member of the appellee class had a private right of action to enforce the obligations imposed on the DHS by local statutes and regulations. Moreover, these statutes provide an independent basis for supporting the district court's judgment. We therefore affirm the district court without addressing the federal statu-

tory and constitutional claims. Our authority to decide the case entirely on pendent state grounds is incontrovertible. The Supreme Court has held that "where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question ... the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722 (1966) (quoting *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)).

No challenge has been raised to the district court's certification of the class. In any event, such certification was proper in relation to the pendent claims, as well as the federal claims. The children could not have brought their District law claims as a class action in the Family Division. *See* Rules Governing Neglect Proceedings Rule 1(b) (excluding from list of rules applicable to neglect proceedings the rule providing for class actions). They clearly could, however, have brought these claims as a class action in the District of Columbia Superior Court. *See* D.C. SUPER. CT. R. CIV. P. 23. It thus is not necessary for us to consider the issue of whether the federal district court could have entertained the pendent claims as a class action if the procedure had in fact been unavailable to the children in the District of Columbia courts.

III. CONCLUSION

Because the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case. It appears that each provision of the remedial order reflects the requirements of District of Columbia statutes and regulations, as well as of federal statutes. Nevertheless, because the order was drafted to conform with federal as well as with District law, there are scattered references in the order to federal law that are inappropriate in light of our confirmation of the decision entirely on the basis of local law.

We therefore remand to the district court, with instructions to fashion an equally comprehensive order based entirely on

District of Columbia law, if possible. If there are any portions of the consent decree that depend entirely on a federal statute, the district court should consider the impact of *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), on those provisions before it includes them in the revised consent decree.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1992

No. 91-7159
CIVIL ACTION No. 89-1754

LASHAWN A., BY HER NEXT FRIEND
EVELYN MOORE, *et al.*

v.

SHARON PRATT DIXON, *et al.*,
Appellants.

Before: MIKVA, *Chief Judge;* SENTELLE AND RANDOLPH, *Circuit Judges.*

ORDER

Upon consideration of appellants' petition for rehearing, filed May 13, 1993, it is

ORDERED, by the Court, that this petition is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

FILED: AUGUST 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1992

No. 91-7159
CIVIL ACTION No. 89-1754

LASHAWN A., BY HER NEXT FRIEND
EVELYN MOORE, *et al.*

v.

SHARON PRATT DIXON, *et al.*,
Appellants.

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges.*

ORDER

Appellants' Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Buckley and Williams would grant the suggestion solely for the purpose of certifying to the District of Columbia Court of Appeals the issue of whether District of Columbia law provides a private right of action in this case.

Circuit Judge Ruth B. Ginsburg did not participate in this matter.

FILED: AUGUST 9, 1993

Supreme Court, U.S.
FILED

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No. 96-OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Appendix (Volume II) to
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LASHAWN A., et al., Plaintiffs	)	FILED
	)	NOV 12 1993
v.	)	Civil Action No. 89-1754
SHARON PRATT KELLY, et al., Defendants	)	

ORDER

Upon consideration of defendants' memorandum on remand, defendants['] supplementary memorandum, and plaintiffs' response thereto,[1/] and the arguments of counsel at the hearing held on November 10, 1993, the Court rejects defendants' claim that the Court of Appeals' decision requires the Court to vacate or substantially modify the remedial order.

First, the Court does not interpret § XXII(C) of the remedial order as requiring the Court to vacate the remedial order. Section XXII(C) provides, in part, "[i]n the event that the court's Memorandum Opinion of April 18, 1991 is vacated in its entirety, this Order and any subsequent implementation plan or plans shall be null and void." The Court of Appeals clearly affirmed this Court's Memorandum Opinion. See LaShawn A., 990 F.2d 1319, 1325 (D.C. Cir. 1993) ("Because the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case"). The fact that the Court of Appeals affirmed the Opinion solely on the basis of local law does not transform the Court of Appeals' affirmance into an order vacating this Court's decision in its entirety.

[1/] Additionally, the Court considered plaintiffs' motion to compel compliance with this Court's Order of October 4, 1993, defendants' opposition thereto and defendants' substitute remedial order.

Likewise, the Court rejects defendants' argument that "basic principles of contract law" require the Court to void the remedial order. The remedial order, to which defendants negotiated and consented, contains no provision which provides that the entire order would be vacated if the Court of Appeals[] affirmed this Court's Memorandum Opinion solely on the basis o[f] local law.

Finally, having carefully reviewed the Court of Appeals['] opinion, the Court does not find that the remedial order must be substantially modified. The Court of Appeals found that "the district court judgment is completely supportable on the grounds of local law." 990 F.2d at 1322. To the extent that portions of the remedial order exceed the terms of local law, the Court invokes its equitable authority in approving the consent decree. The provisions of federal law contained therein are not the basis of the consent decree. Rather, they merely represent general guidelines for the relief this Court and the parties have deemed both necessary and appropriate.

In light of the Court's ruling, plaintiffs are directed to prepare an amended remedial order to which defendants may file an appropriate response. The Court will conduct a hearing on Monday, December 6, 1993, at 2:00 p.m., in Courtroom 9. At that time the, the Court will consider the parties' positions on the proposed remedial order. Additionally, the Court will consider arguments addressing plaintiffs' motion to modify on the basis of changed circumstances. The Court directs Dr. Vincent C. Gray, Director of the Department of Human Services, to attend this hearing, and strongly urges Mr. John Payton, Corporation Counsel, to attend as well.

SO ORDERED.

Dated: *12th* November, 1993.

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LASHAWN A., et al.,
Plaintiffs

v.

SHARON PRATT KELLY, et al.,
Defendants

FILED
DEC 13 1993
Civil Action No. 89-1754

ORDER

Upon consideration of plaintiffs' modified proposed final order and all of the recent filings - including, defendants' memorandum on remand, defendants' supplemental memorandum on remand, plaintiffs' response thereto, defendants' proposed remedial order, and defendants' comments on plaintiffs' proposed modified order - as well as the arguments of counsel at the hearings held in open court on November 10, 1993, and December 6, 1993, the Court will adopt plaintiffs' modified final order, in part.

In light of the Court of Appeals' decision affirming this Court's opinion entirely on the basis of local law, the Court is reluctant to allow provisions that directly conflict with District of Columbia law to remain in the final order. Based on defendants' submissions, it appears to the Court that some of the provisions in the modified order may possibly directly conflict with local law, specifically, those addressing the following areas: protective services, general assistance, case planning, licensing requirements, and contract review. See Suppl. to Defs.' Mem. on Remand at 1-6. Accordingly, the Court directs plaintiffs to file, within 14 days of this order, comments on these particular areas of the proposed modified order.

SO ORDERED.

Dated: *10th* December, 1993.

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LASHAWN A., et al., Plaintiffs	)	FILED JAN 27 1994
v.	)	Civil Action No. 89-1754
SHARON PRATT KELLY, et al., Defendants	)	

ORDER

In accordance with the ruling issued from the bench at the January 28, 1994 hearing, the Court adopts plaintiffs' modified final remedial order in full. Having carefully reviewed all of the recent filings and the five specific areas identified in this Court's December 13, 1993 order,[1/] the Court is satisfied that none of the provisions of plaintiff[s'] proposed modified remedial order directly conflict with or violate local law. In order to cure the widespread local law violations this Court has previously found, the Court deems it a necessary and appropriate use of its equitable authority to order a remedy which exceeds the specific mandates of local law. Accordingly, the Court adopts plaintiff's proposed order. In the event the Children's Advocacy Center becomes substantially impeded by the terms of the modified remedial order, defendants are free to seek additional modifications of the remedial order.

A quarterly review status conference is scheduled for March 3, 1994, at 9:00 a.m.

SO ORDERED.

28th January, 1994. */s/ Thomas F. Hogan*
Thomas F. Hogan
United States District Judge

[1/]The December 13, 1993 order identified the following areas: protective services, general assistance, case planning, licensing requirements and contract review.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 1995 Decided October 31, 1995

No. 94-7044

LaShawn A., et al.,
Appellees

v.

Marion S. Barry, Jr.,
As Mayor of the District of Columbia, et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 89cv01754)

Donna M. Murasky, Assistant Corporation Counsel, argued the cause for appellants. With her on the briefs were *Garland Pinkston*, Acting Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Christopher T. Dunn argued the cause for appellees. With him on the brief were *Marcia R. Lowry, Elizabeth Symonds* and *Arthur B. Spitzer.*

Before: WILLIAMS, HENDERSON and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* RANDOLPH.

WILLIAMS, *Circuit Judge*: This case appears before us for the second time, with the defendants—the mayor and other officials of the District of Columbia—asking for relief from a consent decree pursuant to which the district court is exercising broad supervisory authority over the District's child welfare system. Because the district court has not re-examined the validity of the federal claims underlying its jurisdiction since the Supreme Court issued a decision that seems to undermine the statutory support for federal jurisdiction (though not the constitutional basis of certain claims), we remand the case to the district court to perform that re-examination. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1966).

* * *

Plaintiffs, a class of children who either are in foster care under the supervision of the D.C. Department of Human Services ("DHS"), or have been reported to be abused or neglected but are not yet in DHS care, sought injunctive relief based on alleged violations of federal statutory and constitutional law, as well as of local law.

The district court agreed for the most part with plaintiffs. *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991). It found explicitly that the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–27 and §§ 670–79, afforded plaintiffs rights actionable under 42 U.S.C. § 1983 (1988), and held implicitly that the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–06, did so as well. See 762 F. Supp. at 988–89. It detailed widespread violations of those statutes. *Id.* at 968–87. The court proceeded to find that

children in foster care under the supervision of the District enjoyed a liberty interest under the U.S. Constitution, *id.* at 991–92, with a concomitant right to such services as were "essential to preventing harm" to the children, *id.* at 993. Compliance with this norm was to be measured by the "professional judgment standard", drawn from *Youngberg v. Romeo*, 457 U.S. 307 (1982). Under that standard, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323 (quoted at 762 F. Supp. at 994). Finally, the court held that various practices of the District violated that standard, as well as the two pertinent federal statutes and various provisions of local law. 762 F. Supp. at 996–98. It did not find a private right of action for the children under D.C. law, although its discussion of possible entitlements protected under the due process clause may have assumed such rights. *Id.* at 993–94.

In response to this merits determination, the parties negotiated a broad consent decree, which in its current form occupies 90 single-spaced pages and constitutes a rather comprehensive manual for the conduct of the District's child welfare activities. The agreement reserved defendants' right to appeal the district court's liability ruling and addressed the possibility that the court's merits opinion might be "vacated" in whole or in part. Section XXII(C) provides:

> In the event that the court's Memorandum Opinion of April 18, 1991, is vacated on appeal in its entirety, this Order and any subsequent implementation plan or plans shall be null and void. In the event that the court's Memorandum Opinion of April 18, 1991, is vacated on appeal in part, the portions of this Order or any subsequent implementation plan or plans that are directly based on that part of the Memorandum Opinion that is vacated shall be null and void.

In their first appeal, defendants challenged the findings of constitutional violations. They also claimed that, in light of

the intervening Supreme Court decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), holding that §§ 671(a)(9) & (a)(15) of the Adoption Assistance Act are not enforceable in a § 1983 action, the federal statutes on which the district court had relied were not enforceable by private plaintiffs. This court found it unnecessary "to confront these constitutional and federal statutory issues, for the district court judgment is completely supportable on the grounds of local law", which, we said, creates a private cause of action both "for children in foster care and for children reported to have been abused or neglected but not yet in the District's custody." *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1322, 1325 (D.C. Cir. 1993). Because the consent decree had been drafted to conform to federal as well as local law, we remanded to the district court "with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible. If there are any portions of the consent decree that depend entirely on a federal statute, the district court should consider the impact of [*Suter*] on those provisions before it includes them in the revised consent decree." *Id.* at 1326.

On remand, the district court declared, despite our having explicitly sidestepped the issue of liability under federal law, that we had "clearly affirmed this Court's Memorandum Opinion." *LaShawn A. v. Kelly*, Civ. No. 89–1754, Order at 1 (D.D.C. Nov. 12, 1993) (citing our decision, 990 F.2d at 1326 ("Because the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case.")). On that basis, it rejected defendants' argument that § XXII(C) of the consent decree required modification of the decree. *Id.* at 2. It did not in any way address whether other circumstances—such as the *Suter* decision itself—might require modification of the decree or re-examination of the court's jurisdiction under *United Mine Workers v. Gibbs*. After modifying certain provisions of the consent decree to remove terms that the parties evidently agreed were in violation of District law, it rejected defendants' contention that some provisions still violated local law. It acknowledged that the decree "exceeds the specific mandates of local law", but found the excess "a

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necessary and appropriate use of [the court's] equitable authority" in light of defendants' "widespread local law violations". *LaShawn A. v. Kelly*, Civ. No. 89–1754, Order at 1 (D.D.C. Jan. 27, 1994). See also Order of Nov. 12, 1993 at 2 ("To the extent that portions of the remedial order exceed the terms of local law, the Court invokes its equitable authority in approving the consent decree.").

* * *

Defendants now return to us, questioning whether the district court has jurisdiction to enforce a wide-ranging institutional reform order against the government of the District of Columbia based entirely on District of Columbia law. We regard the defendants' claim as basically posing a question under step 2 of *Gibbs*, namely, whether, given power at the outset *in a generalized sense* to decide the plaintiffs' state law claims, the district court should, despite *Suter*, exercise that power in the form of continuing to enforce a massive institutional reform decree of the sort it had originally adopted.

Law of the Case Considerations

Plaintiffs respond that the jurisdictional question has already been decided, by the panel in the first appeal, so that defendants' claim is barred by law-of-the-case doctrine. That doctrine embodies the general rule that

> a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases. When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court.

Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 739 (D.C. Cir. 1995). The doctrine normally applies to issues decided explicitly or "by necessary implication". *Id.*

These conventional requirements have certainly been fulfilled in this case. The prior panel's decision necessarily implied that a remedial order supported entirely by local law

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could properly be entered. The court explicitly recognized that its affirmance rested "entirely on the basis of local law", *LaShawn A. v. Kelly*, 990 F.2d at 1326, and implicitly held that an order devoid of federal support would present no jurisdictional problem. We said that our "authority to decide the case entirely on pendent state grounds is incontrovertible", *id.*, citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966), for the proposition that a federal court presented with federal and local law claims may, "even though the federal ground be not established . . . nevertheless retain and dispose of the case upon the non-federal ground", *id.* (emphasis deleted). As to the second step required by *Gibbs*, the decision whether under the conditions prevailing the district court should exercise power over the pendent local-law claim by continuing enforcement of a 90–page child welfare code, the prior panel passed *sub silentio*. Its remand to the district court for entry of an order based entirely on local law necessarily implied that the answer to this question was "yes".

Law of the case, however, is a prudential doctrine that "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (citations omitted). "A court has the power to revisit prior decisions *of its own* or of a coordinate court in any circumstance". *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (emphasis added). The Court in *Christianson* noted, however, that "as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* (citation omitted).

In *Christianson* itself, the Court rejected defendant's theory that the Seventh Circuit's determination that it lacked jurisdiction bound the Federal Circuit to that view, on transfer from the Seventh. Once the Federal Circuit decided that the Seventh's view was "'clearly wrong' it [the Federal Circuit] was obliged to decline jurisdiction," *id.* at 817, thus applying the conventional exception for clear error. In any event, law of the case in the lower courts could not constrain

the Supreme Court's *own* review. "Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review." *Id.* In a footnote dictum, however, the Court said,

> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice. But cf. *Potomac Passengers Assn. v. Chesapeake & Ohio R. Co.*, . . . 520 F.2d 91, 95 n.22 [(D.C. Cir. 1975)].

486 U.S. at 816 n.5.

As the "But cf." cite suggests, our holding in *Potomac Passengers* directly contradicted the *Christianson* dictum. In *Potomac Passengers* this court found that it had erroneously decided a jurisdictional issue in a prior appeal and proceeded to correct the mistake. Though apologizing for the earlier mistake, the court insisted on the need for correctness as to issues of subject matter jurisdiction: "When an appellate court makes so fundamental an error as that of sustaining federal subject matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake." 520 F.2d at 95 n.22. *Potomac Passengers* has been widely cited for the proposition that jurisdictional questions are relatively unrestrained by law of the case.[1]

Courts have applied *Christianson*'s discussion of law of the case doctrine relating to jurisdictional questions only in cases

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[1] See, e.g., *Green v. Dept. of Commerce*, 618 F.2d 836, 839 & n.9 (D.C. Cir. 1980); *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 532–33 & nn.2–4 (D.C. Cir. 1980); *Acton Corp. v. Borden*, 670 F.2d 377, 380 n.2 (1st Cir. 1982); *Crane Co. v. American Standard*, 603 F.2d 244, 247 (2d Cir. 1979); *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 n.2 (5th Cir. 1983); *Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983); *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051, 1056 (7th Cir. 1986).

involving the propriety of transfers.[2] See, e.g., *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 546 n.4 (D.C. Cir. 1992) ("Review of a transfer order [including jurisdictional grounds] in a transferee court is exceedingly limited.") (dictum citing *Christianson*); *Wang Laboratories v. Applied Computer Sciences*, 958 F.2d 355, 358 (Fed. Cir. 1992) (accepting case transferred by First Circuit, the court reasoned that "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end"); *Moses v. Business Card Express*, 929 F.2d 1131, 1137 (6th Cir. 1991) (upholding, under *Christianson*, district court's decision to apply law-of-the-case principles to transfer decision made pursuant to forum selection clause; technically venue rather than jurisdictional issue). While courts have sometimes applied law of the case to jurisdictional questions, in doing so they have neither relied on the *Christianson* dictum nor even expressly considered whether jurisdictional issues called for special treatment. See *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C. Cir. 1995); *In the Matter of Memorial Estates*, 950 F.2d 1364, 1367 (7th Cir. 1991); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1151 (2d Cir. 1988); *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769 (9th Cir. 1986) (pre-*Christianson*). And two of the circuits that once applied law of the case to a jurisdictional issue without discussion, the Ninth and the Second, later refused to do so when they zeroed in on the special character of jurisdictional matters. In *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988), decided several months after *Christianson*, the Ninth Circuit held that a district court was not barred by law of the case from reconsidering its own non-final orders. The court cited *Potomac Passengers* for the proposition that "[s]ubject matter jurisdiction, because of its intrinsic importance to the judicial power of the federal courts, is particularly suitable for reconsideration." *Id.* And the Second Circuit applied the same principle in *DiLaura v. Power Authority*, 982 F.2d 73,

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[2] The lone exception seems to be a case involving personal, not subject matter, jurisdiction. *In the Matter of Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1292 (7th Cir. 1992).

77 (2d Cir. 1992), noting that "subject matter jurisdiction is particularly suited for reconsideration", although, to be sure, as Judge Winter noted in a separate opinion, the issue was in fact moot because what might have been law of the case for the district court could not have prevented review by the court of appeals, see *id.* at 81. Wright & Miller have noted that "[q]uestions of subject matter jurisdiction are particularly apt to be free of law of the case principles", citing *Potomac Passengers.* Wright & Miller, *Federal Practice and Procedure* § 4478 at 799 n.32 (1981) (under the heading "Suitable to Reconsider"). "In addition to the great importance that is generally attributed to jurisdictional limits, such questions may at times involve *matters of discretion that inherently require reexamination as a case progresses*", *id.* (emphasis added), the latter phrase being apparently an allusion to step 2 of *Gibbs.* The 1995 Supplement to Wright & Miller does not modify that passage, 1995 Supplement at 739–40 n.32, citing *Christianson* under the separate category of "Propriety of Transfer: Transferor reconsideration", *id.* at 730 n.26.

The dissent attempts to elevate law of the circuit doctrine (which supposedly has no exceptions) above law of the case doctrine (which concededly does). Dissent at 1–4. Plaintiffs, although they argued law-of-the-case vigorously, never suggested this distinction, perhaps because they thought there was none—that at the court of appeals level exceptions to law of the case were necessarily the same as exceptions to law of the circuit. Nor did our own precedent on the subject, *Potomac Passengers,* perceive such a distinction.

Among jurisdictional issues, the ones most strongly inviting a relaxed application of law of the case are those that the prior decision never explicitly confronted. In *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984) ("*Pennhurst II*"), the Court certainly acted as if such an exception to ordinary law of the case doctrine existed. In *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981) ("*Pennhurst I*"), the Court itself cast doubt on the federal basis for a consent decree enforced against state officials, see id. at 18–27, and remanded the case to the Court of Appeals to determine the validity of the federal claims.

The Court also remanded state law claims to determine "whether state law provides an independent and adequate ground which can support the court's remedial order." *Id.* at 31. The remand order thus necessarily implied that a federal court would have jurisdiction to enter the order on state law grounds alone.

On remand, the Court of Appeals acted on the implied permission *Pennhurst I* had given and found that the Pennsylvania statute provided "adequate support for [the order] independent of federal law". *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647, 656 (3d Cir. 1982). Again the Supreme Court reversed, holding that the Eleventh Amendment denies federal courts jurisdiction to order state officials to conform their conduct to state law. 465 U.S. at 117–21. It brushed aside several earlier implicit rulings to the contrary in other cases, announcing that stare decisis principles did not bind its reconsideration of the jurisdictional issue. ("When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Id.* at 119.)

Pennhurst II is not, of course, identical to the current issue. First, the direct bar of the Eleventh Amendment is plainly of greater force than the discretionary jurisdictional limit of *Gibbs* step 2. Second, though the Court alluded to implicit holdings to the contrary in *other* cases, it did not acknowledge the necessary implication of *Pennhurst I* that there was federal jurisdiction for an injunction resting solely on state law, and thus an obvious ground for applying law-of-the-case. Especially given the merely "prudential" character of law-of-the-case restrictions, and the doctrine's grounding in concerns of judicial economy, see, e.g., *Crocker*, 49 F.3d at 739–40, however, the Court's action strongly suggests that law-of-the-case considerations give way more readily to jurisdictional concerns, at least where the initial decision has failed to address the issue explicitly.

We thus turn to consider whether a *Gibbs* step 2 inquiry is jurisdictional. When a federal court is presented with a

combination of federal and state claims, it must pursue the two-step analysis outlined in *Gibbs*. 383 U.S. at 725–27.[3] The first step requires the court to evaluate the substantiality of the federal claim and whether the state and federal claims "derive from a common nucleus of operative fact". *Id.* at 725. If these requirements are met, then "there is *power* in the federal courts to hear the whole". In our first pass at this case, we got that far and stopped. Finding that there had been (prior to *Suter*) a substantial federal claim, we asserted "incontrovertible" authority "to decide the case entirely on pendent state grounds". 990 F.2d at 1326.

But *Gibbs* makes clear that that should not be the end of the inquiry. The Supreme Court has spoken of *Gibbs* step 2 in terms that mark it as a jurisdictional inquiry, in the sense that it requires continuous re-examination as the litigation and surrounding legal context develop. As *Gibbs* itself says:

> That power need not be exercised in every case in which it is found to exist.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.... The question of power will ordinarily be resolved on the pleadings. *But the issue whether pendent jurisdiction has properly been assumed is one which remains open throughout the litigation.* Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited.

383 U.S. at 726–27 (emphasis added). And more recently the Court stated in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988):

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[3] Because this litigation was commenced before December 1, 1990, the new supplemental jurisdiction statute, 28 U.S.C. § 1367 (Supp. V 1993), does not apply.

> Under *Gibbs*, a federal court should consider and weigh in each case, *and at every stage of the litigation*, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. at 350 (emphasis added).[4]

Lower federal courts of appeals, including this circuit, have followed the Supreme Court's lead and treated the *Gibbs* step 2 inquiry as jurisdictional—and accordingly have raised the issue on their own. The Seventh Circuit raised a *Gibbs* step 2 issue sua sponte in *Maguire v. Marquette University*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987). After dismissing plaintiff's federal claim before trial, the district court had proceeded to review a pendent state law claim on the merits. Although defendant did not raise a *Gibbs* step 2 issue on appeal, the Seventh Circuit declared that "because the rule is jurisdictional, we are obligated to raise it ourselves." *Id.* at 1218 n.4 (emphasis added). The court then vacated the district court's dismissal of the pendent claim on the merits. This court has likewise treated *Gibbs* step 2 analysis as jurisdictional and raised the issue sua sponte. In *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1361 (D.C. Cir. 1990), the district court had previously dismissed both federal statutory and state contract

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[4] Cf. *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (holding that mere consent of local officials, without viable federal claim, could not justify continued enforcement of decree against city) ("the court must ensure that there is a substantial federal claim, *not only when the decree is entered but also when it is enforced*, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder") (emphasis added).

claims under the Free Exercise Clause of the First Amendment. This court held that the district court had correctly dismissed the federal statutory claims, but had incorrectly dismissed the state contract claims on First Amendment grounds. Without prompting, the court proceeded to hold that because the district court had properly dismissed the federal claim before trial, under *Gibbs* step 2 it should also dismiss the pendent state law claim unless it found diversity of citizenship. *Id.*

The dissent dispatches *Maguire* and *Minker* by characterizing them as applications of a newly coined *Gibbs* step one-and-a-half—cases where the federal claim survives step 1 but is dismissed before trial. Dissent at 10. Thus, in its view, the Seventh Circuit's and our treatment of that situation as jurisdictional can't possibly mean that *Gibbs* step 2 is jurisdictional. But until the dissent, no one has perceived this circumstance as involving a special kind of *Gibbs* step; it is simply an instance of *Gibbs* step 2 so clear that any continued assertion of jurisdiction by the district court would be an abuse of discretion. See *Gibbs*, 383 U.S. at 726.

In sum, the key issue here—the application of *Gibbs* step 2—(1) is jurisdictional, and thus is subject to continuous reexamination throughout the enforcement of a consent decree (even without a party's raising it) and (2) was never explicitly addressed in our prior decision. Our non-discussion of the finding of continued jurisdiction suggests that it consumed few or no judicial resources. Taking our cue from the Supreme Court in *Pennhurst II*, therefore, we conclude that the interest in limiting federal courts to the exercise of their proper jurisdiction outweighs the marginal contribution to stability and judicial economy that could be achieved by giving finality to our prior *sub silentio* treatment of the *Gibbs* step 2 issue.

Gibbs Step 2 Analysis

As we said before, the first part of the *Gibbs* test is satisfied once a federal court is determined to have *power* over state claims because of a substantial related federal claim. That part is indeed satisfied here. Step 2 of the

Gibbs test requires a weighing of factors to determine whether, although power exists, it should be exercised in favor of jurisdiction. These factors include judicial economy, convenience and fairness to litigants, avoidance of needless decisions of state law (in order to promote comity and obtain a "surer-footed reading of applicable law"), the timing of the dismissal of the federal claims, the predominance of state versus federal issues, and the potential for jury confusion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1966). The initial decision lies in the discretion of the district court, subject to review for abuse of discretion in the court of appeals. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265–66 (D.C. Cir. 1995).

Two circumstances weigh heavily against allowing pendent jurisdiction: federal claims have either dropped out or are greatly weakened, and the local claims lead to extensive entanglement in local government operations.

First, the elimination or weakening of federal claims obviously weighs against exercise of pendent jurisdiction.[5] *Gibbs* itself said: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726. Courts have held that pendent state claims should be dismissed if the federal claim drops out quite late, even after trial. See, e.g., *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir. 1991) ("The judicial economy factor should not be the controlling factor, and it may be appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution."); *Powell v. Gardner*, 891 F.2d 1039, 1047 (2d Cir. 1989) (holding that even after a trial on the merits,

[5] We do not hold that the disappearance of federal claims from a case *automatically* deprives a federal court of jurisdiction over all types of pendent claims, which would be contrary to *Rosado v. Wyman*, 397 U.S. 397, 404–05 (1970). The disappearance or weakening of federal claims are simply factors to be considered in step 2 of a *Gibbs* analysis. We do not understand why the dissent flogs us with "conflict[ing] directly with *Rosado*." Dissent at 12–13.

district court properly dismissed pendent state law claims after directing a verdict in favor of defendant on federal claim).

Similarly, predominance of local law issues weighs against exercise of pendent jurisdiction. In *Gibbs*, the Supreme Court noted "if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, *or of the comprehensiveness of the remedy sought*, the state law claims may be dismissed without prejudice". 383 U.S. at 726 (emphasis added). As *Gibbs* suggests, considerations of comity weigh especially heavily in cases involving massive consent decrees controlling government bodies. Even before *Pennhurst*, federal courts were concerned about controlling state agencies through exercise of pendent jurisdiction under *Gibbs* step 2. In *Evans v. Buchanan*, 468 F. Supp. 944, 956 (D. Del. 1979), for example, the court refused to exercise pendent jurisdiction under *Gibbs* to redesign a state school district tax, citing "the intricacies of the state-law issue" and "questions of comity raised by the remedies proposed." [6]

Although injunctions against District of Columbia officials based on District law are not outright banned under the Eleventh Amendment, which applies only to states,[7] *Pennhurst II* does suggest that, in general, injunctions against

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[6] See also *Catalano v. Dept. of Hospitals*, 299 F. Supp. 166, 175 (S.D.N.Y. 1969) (refusing to exercise pendent jurisdiction under *Gibbs* to determine whether income exemption regulation conformed to state law, since issue "presents a question of state legislative intent and delegation of powers to an administrative body, which more appropriately lies within the ambit of the state court's expertise with respect to its own laws").

[7] We note that the First Circuit has interpreted the term "state", as used in the Eleventh Amendment, to include more than just the 50 obvious ones, ruling that Puerto Rico is covered by the Eleventh Amendment "in the same manner, and to the same extent, as if [it] were a State." See *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991). But we decline to follow the First Circuit's approach here.

nonfederal officials based on nonfederal law should be disfavored. Indeed, we have consistently stressed the respect due the courts of the District of Columbia in applying District law. In applying jurisdictional aspects of exhaustion doctrine, for example, we have noted that "the federal courts owe to the District of Columbia the comity extended to a state". *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 28 F.3d 130, 134 (D.C. Cir. 1994). Moreover, we have followed this principle in applying Gibbs step 2. In *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 772 (D.C. Cir. 1982), we held that the district court had abused its discretion in exercising pendent jurisdiction over novel and unsettled questions of D.C. law (fiduciary duty issues). And in *Grano v. Barry*, 733 F.2d 164 (D.C. Cir. 1984), we underlined the importance of avoiding unnecessary federal court invasions of local self-government. One part of an injunction had become moot and the other rested solely on a mistaken belief that local officials' violation of local law *ipso facto* violated the federal Constitution. After explaining that local law violations were not automatically federal violations and that rights created by local law should normally be vindicated in local courts, we turned to the possibility of pendent jurisdiction and rejected it:

> In general, "principles of comity and the desirability of a 'surer-footed reading of applicable law' support the determination of state claims in state court." [Citing *Gibbs* and a D.C. Circuit case.][3] Determination by the state court is especially important where the case involves "novel and unsettled" issues of state law.... Here, the law in question is new, its meaning ambiguous and sharply disputed. Moreover, the district court should not retain jurisdiction because this case *directly implicates the processes by which a locality governs itself.* Appellees' remedy, if any, lies in the courts of the District of Columbia.

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[3] Although the District of Columbia is constitutionally distinct from the states, it may nevertheless be treated as a state for present purposes....

Id. at 169 (emphasis added). Similarly, in *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993), while the court found the first step of *Gibbs* satisfied in a case under the Fourteenth Amendment, the Adoption Assistance and Child Welfare Act, and the Child Abuse Prevention and Treatment Act, and while it for unexpressed reasons did not regard the *Pennhurst II* bar as insurmountable, *id.* at 325, it cautioned the district court about devoting federal judicial resources to enforcement of a decree under a pendent state law claim—even where the state legislature had explicitly imposed the precise terms of the decree on the state welfare agency. Noting the "decidedly minor" interest of federal courts in remedying violations of state law, *id.* at 325–26, the court vacated the decree and remanded the case to the district court, with instructions to weigh the "constitutional, statutory, and institutional factors that bear upon the task of crafting a suitable equitable decree". *Id.*[8]

It is true that we have upheld an injunction against District officials based solely on pendent District law grounds. See *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988). But there our application of *Gibbs* step 2 found only that the district court had not abused its discretion by ordering an injunction against the District of

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[8] See also *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc). Although *Evans* involved a pure "municipal corporation", the city of Chicago, the court recognized the force of comity principles even as to political entities not covered by the Eleventh Amendment. When making inquiries into jurisdictional support for a consent decree, "courts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance." *Id.* at 479.

The dissent appears to suppose that we rely on the Eleventh Amendment. Dissent at 16–18. If for some reason the paragraphs above leave any doubt on the subject, No, we do not; we rely primarily on circuit precedent affording a similar (and doubtless weaker) comity to the District of Columbia, with support from other circuits recognizing the role of comity where it was not (or was perceived as not) mandated by *Pennhurst II*.

Columbia prohibiting it from spending public funds to oppose citizens' initiatives. Such a limited, prohibitory injunction offends the principle of comity to a far lesser extent than the wide-ranging, positive institutional reform injunction here.

So far, we have considered the two factors of a vanishing federal claim and an intrusive remedy based on local law grounds separately. But the two factors are closely related. *Gibbs* sets out a multi-factor balancing test, and presumably a factor pointing in one direction could offset one pointing in the other, and a strong factor pointing in one direction would reinforce a weak factor pointing in the same direction. So, for instance, the greater the intrusion on local government, the more substantial the federal claim should be. It seems at least doubtful that an intrusion such as the consent decree here could be supported where the Supreme Court has found two of the federal statutory provisions inadequate to ground a § 1983 claim—unless the remaining statutory clauses can be successfully distinguished.

Because the district court failed to consider the impact of *Gibbs* step 2 factors—particularly considerations of comity—on its exercise of jurisdiction, we remand the case with instructions on how to proceed. Cf. *Webb v. Bladen*, 480 F.2d 306, 309–10 (4th Cir. 1973) (remanding case for *Gibbs* step 2 analysis where the district court failed to recognize that it had discretion under *Gibbs* to hear pendent claims and erroneously thought it was required to dismiss state claims for lack of jurisdiction).

Further Considerations on Remand

Any specific provision of the consent decree that can be grounded in what the court concludes is a winning federal claim should of course be preserved.[9] The parties here have

[9] We express no opinion as to the merits of the district court's original finding that the post-custody children have valid constitutional claims under the dictum of *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 201 n.9 (1989) ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents,

not briefed the precise impact of *Suter* on each of the various sections of the federal statutes at issue. Accordingly, we remand the case to the district court to make that inquiry in the first instance, in order to determine which, if any, federal grounds survive that could support an injunction. We note that at a minimum, the "reasonable efforts" clause of the Adoption Assistance Act, § 671(a)(15), relied on heavily by the district court, see 762 F. Supp. at 961, 970, 980, 986, and § 671(a)(9), related to its findings at *id.* at 986, are no longer enforceable under the express holding of *Suter*. *See* 503 U.S. at 359 n.10, 364.

Ancillary mandates may be appropriate under the court's equitable jurisdiction, but only to the extent shown necessary to remedy violations that any decree properly addresses under the above standards. See *Missouri v. Jenkins*, 63 U.S.L.W. 4486, 4495 (U.S. June 12, 1995) ("[T]he remedial quality education program should be tailored to remedy the

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we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."). If the district court does reach the issue on remand and adheres to its ruling, it should consider the possibility of bifurcating the class, since in-custody plaintiffs raise issues distinct from those who rely entirely on federal and local statutes.

We note in this connection that although courts ordinarily refrain from deciding constitutional questions when a case can be resolved on the basis of state law, see *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191 (1909), *Pennhurst II* "had the effect of overruling the entire history of *Siler/Ashwander* doctrine in cases where injunctive relief is requested against the state." *Cuesnongle v. Ramos*, 835 F.2d 1486, 1497 (1st Cir. 1987) (citing *Pennhurst II*, 465 U.S. at 123 (majority opinion); 465 U.S. at 159–63 (Stevens, J., dissenting)). The comity afforded the District under *Grano v. Barry* in the application of *Gibbs* step 2, paralleling the rule of *Pennhurst II*, similarly implies that the district court may not exercise jurisdiction over the pendent claims merely to avoid confronting the reverse-*DeShaney* issue. Of course *Ashwander* would under no circumstances suggest any need to refrain from addressing the issues of federal statutory law.

injuries suffered by the victims of prior *de jure* segregation.... On remand, the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.' ") (citations omitted); *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977) ("[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation.... [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.") (citations omitted). Specific provisions that cannot be supported on any of the above bases should be excised from the decree.

Plaintiffs cite *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), for the proposition that defendants may and should be held to the provisions of the consent decree, even though those provisions exceed what the law requires. But as we explain in more detail below, the District, like defendants in *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), consented to the provisions of the decree only to the extent that they were necessary to remedy legal violations and has consistently objected to being subjected to more demanding standards. In *Local No. 93*, by contrast, the defendant city voluntarily accepted and continued to embrace extra obligations, to which only third parties objected. Compare *Rufo*, 112 S. Ct. at 762–63 ("Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated.... [M]isunderstanding of the law could form a basis for modification. In this connection, we note again that the decree itself recited that it 'sets forth a program which is both constitutionally adequate and constitutionally *required*.' ") (citations omitted).

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The district court will confront a number of other issues on remand that the parties have adequately briefed and on which we offer the following guidance.

First, plaintiffs suggest that § XXII(C) forecloses termination of the consent decree, because it calls for termination only on the occurrence of an event—vacation of the district court's original merits opinion in its entirety—that has not taken place. There are a number of flaws in this contention. First, § XXII(C) clearly contemplates partial relief calibrated to partial failure of the grounds on which the district court acted. The consent decree thus does not represent a "compromise [on] genuine uncertainties", *Evans v. City of Chicago*, 10 F.3d 474, 478–79 (7th Cir. 1993) (en banc), but rather a knuckling under to the district court's legal conclusions, contingent on those conclusions being upheld on appeal. The decree specifies that "portions of this Order ... that are directly based on [any] part of the Memorandum Opinion that is vacated shall be null and void." In a literal sense, of course, even the partial condition never had any serious possibility of being fulfilled, for appellate courts rarely vacate district court *opinions* as opposed to *judgments*. But the parties plainly did not bargain for so hypertechnical a reading. Rather, since the provisions of the consent decree were negotiated as responses to specific findings of violations, the parties clearly anticipated that any undermining of those findings would require that the District be freed of the affected provisions. In effect, § XXII(C) is congruent with the lessons of *Pennhurst II*—that major changes in federal law may have the effect of undermining the jurisdictional basis of a continuing decree that is based only on local law. Accordingly, § XXII(C) cannot be read to preclude a consideration of *Suter*'s impact on the decree's legal foundation.

Resting heavily on their contrary reading of § XXII(C), plaintiffs object that defendants failed to move below for modification of the consent decree. Although the defendants did not specifically invoke Fed. R. Civ. P. 60(b)(5), authorizing relief when "it is no longer equitable that the judgment should have prospective application", they indisputably sought relief on the grounds that *Suter* had eroded the basis for the decree, see Defendants' Memorandum on Remand at 4 & n.1 (Oct. 20, 1993), and the district court's orders recognize as much, see, e.g., Order of Nov. 12, 1993, at 1 (referring to

defendants' requests that it "vacate or substantially modify the remedial order").[10] Even apart from § XXII(C), modification of a consent decree under Rule 60(b)(5) would proceed under "a flexible modification standard in institutional reform litigation because such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.' " *Rufo*, 112 S. Ct. at 759 (citations omitted). See also *Evans*, 10 F.3d at 480, 477 (finding that any continued enforcement of a consent decree entered into by the City of Chicago had become " 'inequitable' within the meaning of Rule 60(b)(5)" where the federal grounds had all been found wanting and continuing supervision would burden the district court and entangle it in the operations of "another sovereign"); *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc) (similar).

Second, plaintiffs contend that insofar as *Suter* may draw in question the district court's conclusion that the two federal statutes create rights enforceable under § 1983, Congress has reversed it. They point to the following 1994 enactment:

> In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; *Provided, however*, that this section is not intended to alter the holding in Suter v. Artist M. that section [671(a)(15)] of the Act is not enforceable in a private right of action.

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[10] Even if the defendants had not sought relief on these grounds, we would still be required to investigate the basis of the district court's jurisdiction on our own initiative. See *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1361 (D.C. Cir. 1990); *Maguire v. Marquette University*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987).

Social Security Act Amendments of 1994, Pub. L. No. 103–432, § 211, 108 Stat. 4398, 4460 (Oct. 31, 1994) (to be codified at 42 U.S.C. § 1320a–2); see also Improving America's Schools Act of 1994, Pub. L. No. 103–382, § 555, 108 Stat. 3518, 4057–58 (Oct. 20, 1994) (enacting the same language). Defendants respond that this instruction about "how to go about construing legislation enacted by other Congresses . . . impermissibly intrudes on the judicial power." Reply Br. at 22. We see no need to evaluate defendants' constitutional argument, because we cannot see that the "instruction" bears on the interpretive issues before the district court.

Contrary to the assumptions of plaintiffs' (and the dissent's) arguments, *Suter* did not find provisions of the Adoption Assistance Act unenforceable "because of . . . inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a–2. Rather, as we read *Suter*, its holding was based on the combination of (1) the *Pennhurst I* requirement of a clear statement for any conditions on state receipt of federal grants, see 503 U.S. at 356, (2) the absence of "statutory guidance . . . as to how 'reasonable efforts' are to be measured", *id.* at 360, and (3) the establishment of an alternative enforcement mechanism, see *id.* at 360–61. The discussion of the section's being embedded in the requirements for a state plan, *id.* at 358, seems largely a way station to the point that alternative means of enforcement are provided. The *Suter* Court's principal concern was the Act's vagueness. In discussing the "reasonable efforts" clause, § 671(a)(15) (state must make "reasonable efforts" to prevent need for removing child from his home and to return child to home after removal), the Court noted: "How the State was to comply with this directive, *and with the other provisions of the Act*, was, within broad limits, left up to the State." 503 U.S. at 360 (emphasis added).

This interpretation of *Suter* corresponds with the ordinary inquiry as to whether to infer a private right of action from a statutory scheme, see, e.g., *Cort v. Ash*, 422 U.S. 66 (1975), and has been endorsed by other circuits as well. See, e.g.,

Marshall v. Switzer, 10 F.3d 925, 929 (2d Cir. 1993) ("[T]he significant point in *Suter* was not that the statute in question only required a state to submit a plan to the federal agency but that the statute provided no guidance for measuring 'reasonable efforts.' "); *Wood v. Tompkins*, 33 F.3d 600, 605–06 n.14 (6th Cir. 1994) ("[T]he [*Suter*] Court noted that other sections of the Adoption Act, in contrast to § 671(a)(15), did indeed impose precise requirements on the states in addition to requiring the mere submission of a plan.... [T]he holding is simply that the one particular provision that was at issue is too amorphous to confer enforceable rights."). Likewise, in *Doe v. District of Columbia*, Civ. No. 93–0092, slip op. at 17 (D.D.C. Feb. 25, 1994), the court found that a provision that had originally been relied on in this case, 42 U.S.C. § 5106a(b)(2) (a provision of the Child Abuse Prevention and Treatment Act), "invests only 'generalized dut[ies]' upon the states and does not 'unambiguously confer' an enforceable right to bring a private action against the government." The court at no point relied on Congress's having specified that the requirement should be embodied in a State plan.[11] Of course neither the Social Security Act of 1994 nor the identical language of the Improving America's Schools Act of 1994 did anything to supply more precise standards for the Adoption Assistance Act, or to alter the clear statement requirement or the Adoption Assistance Act's non-judicial enforcement provisions; it thus changed none of the factors on which the *Suter* Court's reasoning depended.

Congress may have been misled by the language of *Suter*'s footnote 10, which says, after setting forth the language of § 671(a)(9), "As this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the 'reasonable efforts' clause of § 671(a)(15)." 503 U.S. at 359 n.10. In conjunction with the

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[11] We note that two district courts interpreting § 211 have deferred to the congressional view that inclusion in a plan was central to *Suter*'s analysis—see *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995); *Harris v. James*, 1995 WL 248796, *10 (M.D. Ala. Apr. 26, 1995)—but we disagree.

opinion's *text*, discussed above, we read the footnote to state essentially that the combination of factors noted above applies with equal force to § 671(a)(9).

The legislative history of the identical 1994 provisions suggests that Congress may also have been confused by *Suter*'s statement that "the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features." 503 U.S. at 358. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 863 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1552 (quoting above sentence). The point of the sentence, however, is simply to distinguish what the statute specifically requires of states (adoption of a *plan* approved by the Secretary) from what—for the reasons given elsewhere in the opinion—it does not require. It certainly does not announce a general rule that mandatory inclusion in a plan demonstrates intent not to create an enforceable right.

The legislative history has another formulation of congressional purpose, but it is no more helpful than the reference to state plans. The Conference report stated that

> The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek *redress in the federal courts to the extent that they were able to prior to the decision in Suter v. Artist M.*, while also making clear that there is no intent to overturn or reject the determination in Suter that the reasonable efforts clause to Title IV–E does not provide a basis for a private right of action.

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257 (emphasis added). But the Court decided *Suter* by applying previously established judicial criteria to a specific instance (§ 671(a)(15)) of a general question (whether Congress intended to create an enforceable right). The dissent in *Suter*, cited by the dissent here, was not correct in claiming that the Suter majority had "changed the rules of the game." 503 U.S. at 377 (Blackmun,

J., dissenting). Even if Congress could wipe *Suter* from the books, we think that lower courts addressing the same issue would have no basis for assuming that, if once again confronted with a *Suter*-like issue, the Supreme Court would not do just what it did in *Suter*. Thus, unless § 211 actually changed part of the test that led to the outcome in *Suter* (which, as we have said, it did not), courts should find equally vague provisions of similar acts equally unenforceable for the reasons that the Court found convincing in *Suter*.

Nor does the second sentence of the 1994 amendments assist plaintiffs. It reads:

> This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by *overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; Provided, however,* that this section is not intended to alter the holding in Suter v. Artist M. that section [671(a)(15)] of [the Act] is not enforceable in a private right of action.

(Emphasis added.) But Congress identified no "grounds" applied in *Suter* that were "not applied in prior Supreme Court decisions respecting ... enforceability." Thus the sentence has no effect on the interpretive issues raised by the Adoption Assistance Act.

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After what may seem a long journey, the core of our conclusion is no more than that we take seriously the Supreme Court's statement in *Gibbs* that "the issue whether pendent jurisdiction has properly been assumed is one which remains open throughout the litigation." 383 U.S. at 727. When a Supreme Court decision such as *Suter* flatly removes some of the supports of pendent jurisdiction, and at a minimum enfeebles most of the others, the "open" issue must be reexamined. To that end, we remand the case to the district court.

So ordered.

RANDOLPH, *Circuit Judge, dissenting:* To paraphrase Edward R. Murrow, anyone who isn't confused by the majority opinion doesn't really understand it.

After six years of litigation, after a trial and a decision of this court sustaining the district court's jurisdiction, after further proceedings on remand, after an order finding the District of Columbia in contempt and the appointment of a receiver, after all this—*voilà*—my two colleagues spot a "jurisdictional" flaw in the case, a flaw everyone else must have overlooked. Of course, they have discovered no such thing. The supposed defect identified in the majority opinion is not of the jurisdictional variety, and the issue the majority opinion addresses is hardly new—this court decided it two years ago when the District first appealed. *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) ("*LaShawn I*"). The District sought rehearing from that decision. The court denied the petition. The District suggested rehearing *en banc*. It did not get the votes. Now my colleagues, forgetting that two judges do not an *en banc* court make, reverse the first panel's ruling. That is, to say the least, an extraordinary result, and so are the reasons given for it. The majority opinion tosses aside settled law, turns its back on Supreme Court decisions, disregards the controlling precedents of this court, rewrites the holdings of other courts, and badly misreads a federal statute.[1]

I

Inconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that " 'we must act alike in all cases of like nature.' "[2] This is an old idea, and it has given rise to two time-honored doctrines of importance to this case. First, the *same issue* presented in a

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[1] For those unacquainted with this class action, I offer a brief history in an addendum to this opinion.

[2] *Ward v. James*, [1966] 1 Q.B. 273, 294 (C.A.) (quoting Lord Mansfield in John Wilkes' case, *Rex v. Wilkes*, 98 Eng. Rep. 327, 335 (1770)). *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

later case in the *same court* should lead to the *same result.* Second, the *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result.* For three-judge panels in the federal courts of appeals, the first proposition reflects a variant of *stare decisis,* which I shall call the law-of-the-circuit doctrine. The second embodies the law-of-the-case doctrine. The majority opinion violates both.

The law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals. Courts of appeals sit in panels, or divisions, of "not more than three judges" pursuant to the authority granted in 28 U.S.C. § 46(c). The "decision of a division" is "the decision of the court." Revision Notes to 28 U.S.C. § 46 (citing *Textile Mills Security Corp. v. Commissioner of Internal Revenue,* 314 U.S. 326 (1941)); *see Critical Mass Energy Project v. Nuclear Regulatory Comm'n,* 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc), *cert. denied,* 113 S. Ct. 1579 (1993). Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. 314 U.S. at 335. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. *E.g., United States v. Caldwell,* 543 F.2d 1333, 1370 n.19 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 1087 (1976). That power may be exercised only by the full court, either through an *en banc* decision, *id.*, or pursuant to the more informal, and dubious, practice adopted in *Irons v. Diamond,* 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). While the law-of-the-case doctrine allows for certain exceptions—although not, to be sure, the one the majority invents today—the law-of-the-circuit doctrine does not. Thus, in circuits such as ours, where both doctrines are at work, the more exacting law-of-the-circuit doctrine supplants the law-of-the-case doctrine when panels hear multiple appeals from a single case. *See, e.g., United States v. 162.20 Acres of Land,* 733 F.2d 377, 379 (5th Cir. 1984) (explaining that when a prior panel in the same circuit has decided an issue, law-of-the-circuit doctrine supplants law-of-the-case doctrine and precludes reconsideration of that decision in a subsequent appeal, even if the second panel believes the first was wrong), *cert. denied,* 469 U.S. 1158

(1985); *cf. Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1077 (D.C. Cir. 1984) (holding that both the law of the case and the law of the circuit precluded a panel from reconsidering issues resolved in a prior appeal in the same case), *cert. denied*, 469 U.S. 1181 (1985).

Until today, the law-of-the-circuit doctrine was completely settled, thoroughly understood and uniformly honored—by the two judges in the majority and the other judges of this court. *See, e.g., Ayuda v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring); *Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 930 (D.C. Cir. 1988) (Williams, J., concurring in denial of rehearing *en banc*), *cert. dismissed*, 501 U.S. 1283 (1991). Likewise, the district judges in this circuit have rightly assumed that a decision of one panel of this court represents the law of the circuit. *See, e.g., Feeling v. Kelly*, 152 F.R.D. 670, 673 (D.D.C. 1994) (relying upon *LaShawn I* to sustain the district court's pendent jurisdiction).

Now things have changed. My two colleagues must admit—and do admit, although rather grudgingly—that they are today overruling the panel's decision in *LaShawn I*. This is beyond dispute. The question the majority opinion addresses is a question *LaShawn I* answered and answered in a way directly contrary to the majority's disposition. *LaShawn I* explained that the District of Columbia's statutory and regulatory scheme was "appropriately before us under our pendent jurisdiction," 990 F.2d at 1324; held that federal judicial authority to decide the case on pendent grounds was "incontrovertible," *id.* at 1326; and affirmed the district court's exercise of that authority by confirming its decision "entirely on the basis of local law," *id.* To put the matter starkly, the first panel—consisting of then-Chief Judge Mikva, Judge Sentelle and myself—directed the district judge not to consider federal claims and to revise the decree accordingly; a majority of the second panel—consisting of Judge Williams and Judge Henderson—now directs the district judge to consider federal claims and modify the decree accordingly. This is more than mere inconsistency. It is flat

contradiction, and—because we are *one* court—it is self-contradiction.

II

Perhaps I should end on this note. But so much else is wrong with what the majority has written that I think it appropriate to say more. Apart from the law-of-the-circuit doctrine, the law of the case foreclosed reopening the question my colleagues address, and the clear dictates of the Supreme Court, the Congress, and the Constitution should have steered them away from the conclusions they reach.

A

"When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995), *cert. denied*, 64 U.S.L.W. 3203 (U.S. Oct. 2, 1995) (No. 95–96); *see also Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). The Supreme Court has instructed the lower courts to be "loathe" to reconsider issues already decided "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). My colleagues identify no such "extraordinary circumstance" here. They can point to no intervening change in controlling legal authority. *See McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995). They do not claim that *LaShawn I* was "clearly erroneous" or that it "would work a manifest injustice." *See Christianson*, 486 U.S. at 817.

Instead, my colleagues invent for themselves an exception to the law-of-the-case doctrine under which a subsequent panel is free to reexamine any "jurisdictional" question decided, but not extensively discussed, by an earlier panel in an

earlier appeal of the same case. This invention is no doubt convenient as my colleagues struggle to reach the result they want here. Unfortunately, it also contradicts both the Supreme Court's 1988 decision in *Christianson v. Colt Industries Operating Corp.* and our own very recent decision in *Crocker v. Piedmont Aviation, Inc.*

First, those decisions make clear that it is of no moment that the three-judge panel in *LaShawn I* devoted little space to the topic that now grabs the attention of two of my other colleagues. As the Supreme Court held in *Christianson*, the law-of-the-case doctrine turns "on whether a court previously decide[d] upon a rule of law . . . not whether, or how well, it explained the decision." 486 U.S. at 817 (internal quotation marks omitted). And in *Crocker*, 49 F.3d at 739, we held that the law-of-the-case doctrine applies to questions decided "explicitly or by necessary implication." The majority admits as much (maj. op. at 5), but then argues that the issues "most strongly inviting a relaxed application of law of the case are those that the prior decision never explicitly confronted" (maj. op. at 9). This is doubly wrong. It misstates *LaShawn I* and it misstates the law. While *LaShawn I* did not provide a detailed analysis of *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), doubtless because the District did not rest its appeal on any supposed lack of pendent jurisdiction, the law-of-the-case doctrine depends not on how extensively the earlier panel discussed the particular issue, but on whether it decided it, as *LaShawn I* assuredly did.

Second, the Supreme Court in *Christianson* specifically rejected the "jurisdictional question" exception the majority manufactures for this case. The Court there said that the law-of-the-case doctrine prohibits a federal court from revisiting another federal court's decision to transfer a case to it so long as the transferee court finds the transfer decision "plausible." 486 U.S. at 819. The Court explained:

> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any is-

> sue—jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice.

Id. at 816–17 n.5. In reaching that conclusion, the Court rejected *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975), in which this court first suggested that the law-of-the-case doctrine might not preclude reconsideration of jurisdictional questions. *Id.* The majority acknowledges the Supreme Court's rejection of *Potomac Passengers*, but then inexplicably ignores it. It is true, as the majority states, that *Potomac Passengers* was "widely cited for the proposition that jurisdictional questions are relatively unrestrained by law of the case" (maj. op. at 7), but that was *before Christianson*. In the seven years since *Christianson*, only two federal courts have even mentioned *Potomac Passengers*, and then only to bolster the unremarkable conclusion that a district court is free to reconsider its own non-final jurisdictional decisions. *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988); *Travelers Indem. Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 530 (D. Conn. 1991).[3] The majority cites no case since *Christianson* in which a federal appellate court has reversed a jurisdictional decision made by a prior merits panel. Today, of course, this court and other courts of appeals routinely apply law-of-the-case preclusion to questions of jurisdiction, *see, e.g., McKesson Corp.*, 52 F.3d at 350; *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1151 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989), and do so even when the first decision regarding jurisdiction is less than explicit. *See, e.g., In re Memorial Estates, Inc.*, 950 F.2d 1364, 1367 (7th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992).

So where does the majority derive the inspiration for its invention? Hunting far and wide for something, anything, to counteract the force of *Christianson* and *Crocker*, the majori-

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[3] *DiLaura v. Power Authority of the State of New York*, 982 F.2d 73, 76–77 (2d Cir. 1992), the only other post-*Christianson* decision the majority cites in support of its law-of-the-case exception, also concerns only the authority of a district court to alter its non-final decisions.

ty comes up with a strange source of support—*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"). No matter that *Pennhurst II* decided nothing about the law-of-the-case doctrine, in fact did not even mention it. It is enough for the majority that the Supreme Court said in *Pennhurst II* that it does not consider itself bound by decisions on questions of jurisdiction made *sub silentio* in previous cases "when a subsequent case finally brings the jurisdictional issue" to the Court. 465 U.S. at 119 (internal quotation marks and citation omitted). But that plainly has nothing to do with this appeal. The cited portion of *Pennhurst II* dealt with the *stare decisis* effect of decisions in *other* cases, not the effect of earlier decisions by the same appellate court in the *same* case.

It would take a mighty leap to get from *Pennhurst II* to the majority's newly-coined rule that an appellate court may freely revisit jurisdictional questions it decided in an earlier appeal of the same case. My colleagues make the attempt, but predictably fall well short. While acknowledging that the Supreme Court never addressed the law-of-the-case doctrine in *Pennhurst II* (maj. op. at 10), they declare—here comes the jump—that the Court "acted" as if the majority's new law-of-the-case exception already existed (maj. op. at 9). The majority's theory has two flaws, both fatal. First, the Supreme Court had no reason to "act" as if the majority's new law-of-the-case exception already existed in *Pennhurst II* because there was no law-of-the-case issue there at all.[4]

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[4] In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) ("*Pennhurst I*"), the Court eliminated one federal basis for a consent decree, then remanded the case to the court of appeals to determine if state law or federal constitutional or statutory grounds could support the decree. *Id.* at 31. *Pennhurst I* did not decide whether the Eleventh Amendment would bar a federal court from granting relief against a state on pendent state-law claims. Rather, in directing the court of appeals to consider *whether* state law could support the decree, the Court directed the court of appeals to consider that question. Only after the court of appeals held on remand that state law alone was sufficient to support the order, 673 F.2d 647 (3d Cir. 1982) (*en banc*), did the Supreme Court squarely

Second, regardless of how the majority thinks the Supreme Court "acted" in *Pennhurst II*, the Court clearly rejected the majority's "jurisdictional question" exception four years later in *Christianson*.

B

Even if my colleagues were free to create an exception to the law-of-the-case doctrine for "jurisdictional questions," they still would face a major problem here: the application of *Gibbs* step two is not, as they claim, "jurisdictional," *see* (maj. op. at 12). It becomes "jurisdictional" in my colleagues' eyes only because they must see it this way. Otherwise, there is no explaining why they ignore the law of the case and take it upon themselves to reexamine this court's earlier holding in *LaShawn I*. And so they form a perfect circle: *Gibbs* step two is jurisdictional because it requires continuous reexamination (maj. op. at 11), and it requires continuous reexamination because it is jurisdictional (maj. op. at 13). There is, however, a rub—the Supreme Court and the lower federal courts have uniformly recognized that the second step of the *Gibbs* analysis is decidedly not jurisdictional. The matter is discretionary. Here the discretion had already been exercised—in *LaShawn I*—in favor of resolving the case entirely on pendent local law grounds.

Obviously, the concept of pendent jurisdiction entails a jurisdictional element, but that is comprised in the first step of the *Gibbs* analysis. *See Wal-Juice Bar, Inc. v. Elliott*, 899 F.2d 1502, 1503 (6th Cir. 1990); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988); *Dimond v. District of Columbia*, 792 F.2d 179, 188 (D.C. Cir. 1986); *Financial Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 772 (D.C. Cir. 1982). Step one of *Gibbs* deals with the court's "power" to hear pendent local law

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confront the Eleventh Amendment question. Since the Court had not faced the question before *Pennhurst II*, it had not established any law of the case to apply.

claims—its jurisdiction—when the case raises a "substantial" federal issue and the federal and local law claims "derive from a common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one proceeding." *Gibbs*, 383 U.S. at 725. The federal courts' subject matter jurisdiction, to the extent Congress authorizes it, is derived directly from Article III, Section 2, extending the judicial "Power" to "all Cases in Law and Equity arising under this Constitution, the Laws of the United States. . . ." U.S. CONST. art. III, § 2; *see also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807 (1986); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395–96 (1980). The doctrine of pendent jurisdiction rests on the idea that the court's jurisdiction over the underlying federal claim brings the related pendent claims under the scope of Article III because they are part of the same "case" or "controversy." *See Gibbs*, 383 U.S. at 725; *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821–23 (1824). *Gibbs'* requirements of a substantial federal claim, a common nucleus of operative fact, and the expectation of one trial, 383 U.S. at 725, "serve[ ] as an operational definition of the 'one constitutional "case" ' language." Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1416 (1983).

There can be not the slightest doubt here that the children's claims under federal statutory law, the Constitution, and District of Columbia law all arise from a common set of facts. The district court's jurisdiction—its power—to decide the local law claims thus turned on the substantiality of the underlying federal claims. Whether a court may decide pendent claims is determined on the face of the pleadings. Contrary to what the majority tells us, the ultimate disposition of the federal claim is "immaterial on the question of power." 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567.1, at 114–15 (1995).

Once a district court finds a substantial federal claim, it has jurisdiction over the entire case. The court then must engage in the second step of the *Gibbs* analysis and decide whether to exercise that jurisdiction over the local or state law claims. This aspect of *Gibbs*—the so-called "key issue" according to my colleagues—is not a jurisdictional determination. It is an entirely prudential one, which is why *Gibbs* held that "pendent jurisdiction is a doctrine of discretion. . . ." 383 U.S. at 726.[5] To reach a contrary conclusion, the majority must misconstrue a decision of the Seventh Circuit and then completely mischaracterize a decision of this circuit. In *Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), the Seventh Circuit did not, as the majority claims, call the *Gibbs* step two analysis jurisdictional. *See* maj. op. at 12. It applied that label only to the *Gibbs* "rule" that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *See Gibbs*, 383 U.S. at 726. The majority's mischaracterization of this court's decision in *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990), is far worse. The majority insinuates that the *Minker* court called *Gibbs* step two a "jurisdictional question." Maj. op. at 13. It did no such thing. In *Minker*, this court said, "Our holding raises a new jurisdictional question on remand." 894 F.2d at 1361. The new question left "on remand" was not a *Gibbs* question—this court handled that one itself—but rather was whether the plaintiff had sufficiently pled diversity to provide an independent basis of jurisdiction over his state-law claim. 894 F.2d at 1361. That is a jurisdictional question all right, but it is not *Gibbs* step two.

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[5] While it is true that the Supreme Court in *Gibbs* explained that the step two question remains open through "the litigation," the Court meant only that the question need not be decided forever on the pleadings, but could be reconsidered during pretrial proceedings or even the trial itself. *See Gibbs*, 383 U.S. at 727. While it may be true that a district court can relinquish its pendent jurisdiction even after trial, *see* (maj. op. at 12), the majority has identified no case in which that question was revisited after a trial, an appeal, a remand, and another appeal.

Despite my colleagues' best efforts, then, *Gibbs* step two remains not a "jurisdictional inquiry," [6] but a prudential determination left to the discretion of the court that makes it. There is no other way to explain *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 595 (1982), in which the Supreme Court held that a federal court's decision whether to resolve pendent local law claims was to be reviewed for abuse of discretion. *See also Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265–66 (D.C. Cir. 1995) (Williams, J.) ("Whether actually to decide [the local-law

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[6] Congress has also explicitly recognized the discretionary nature of the second step of the *Gibbs* inquiry. The Judicial Improvement Act, enacted in 1990 and codified in part at 28 U.S.C. § 1367, states:

> . . . in any civil action of which the district courts have original jurisdiction, the district courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (italics added). When the federal claim drops out, the district court has discretion to retain or dismiss the pendent local law claims: "The district courts *may* decline to exercise supplemental jurisdiction over a claim in subsection (a)" for any of the reasons listed in § 1367(c)(1)-(4). 28 U.S.C. § 1367(c) (italics added).

The majority passes over § 1367 because this case began before the statute's effective date (maj. op. at 11 n.3). But in attaching their jurisdictional label to *Gibbs* step two, my colleagues should have paused to consider that § 1367 "codified the doctrine of pendent jurisdiction developed by the Supreme Court in the case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and its progeny." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995); *see also Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1266 (D.C. Cir. 1995). (The statute also did a good deal more by allowing the federal courts to exercise jurisdiction over pendent parties, *cf. Finley v. United States*, 490 U.S. 545 (1989), as distinguished from pendent claims. *See* David D. Siegel, Practice Commentary, 28 U.S.C.A. § 1367; FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, Part III, at 546–68 (Apr. 2, 1990 & July 1, 1990).)

claims] is a matter left to the sound discretion of the district court.... We review for abuse of discretion.").

The majority purports to apply that standard here, apparently concluding that the district court abused its discretion in "fail[ing] to consider the impact of *Gibbs* step 2 factors—particularly considerations of comity—on its exercise of jurisdiction...." Maj. op. at 18. What discretion? The district court did not address *Gibbs* step two on remand and for good reason: this court already had done so. *See LaShawn I*, 990 F.2d at 1326. The district court, in other words, had no discretion to abuse. It was bound by the holding in *LaShawn I*. *See In re Ivan F. Boesky Securities Litigation*, 957 F.2d 65, 68 (2d Cir. 1992) (explaining that the law-of-the-case doctrine leaves a district court "no discretion" in carrying out an appellate court's directions on remand). If we suppose that the district court abused its discretion in complying with our ruling in *LaShawn I*, what, according to the majority, should the district court have done?

III

The majority's handiwork thus far ought to be enough to leave the district judge thoroughly confused, but my colleagues are not finished yet. For the remand, they direct the district court to apply an entirely new set of pendent jurisdiction rules and then to ignore the clear direction of Congress in interpreting the federal statutory scheme at the center of this case.

A

On remand, the majority declares, the district court must "examine[ ] the validity of the federal claims" and determine whether "any federal grounds survive that could support an injunction." Maj. op. at 2, 19.[7] This direction happens to

[7] It is a mystery to me why the majority assigns this task to the district court, rather than to itself. The questions posed are questions of law, and this court is in as good a position to decide them as the district court. The majority's assignment sets the

conflict directly with *Rosado v. Wyman*, 397 U.S. 397, 405 (1970), which is relegated to a footnote in the majority opinion. In *Rosado v. Wyman*, the Supreme Court roundly rejected the idea that "once a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim." 397 U.S. at 404. Just as a federal court does not lose jurisdiction over a diversity action if one of the parties moves while the appeal is pending, a federal court does not lose pendent jurisdiction over the local law claims if the federal claims are decided against the plaintiff or otherwise drop out of the case. *Id.* at 405 & n.6. In the Supreme Court's words, *Rosado* holds that there is no requirement that a federal court have "jurisdiction over the primary claim at all stages of the litigation as a prerequisite to resolution of the pendent claim," *id.* at 405—a holding completely at odds with the majority's proposition that even now, after an extensive trial and two appeals, the pendent jurisdiction already exercised must be undone unless the plaintiffs' local law claims remain closely intertwined with "winning" federal claims. Under *Rosado*, even if the first panel had reversed the judgment to the extent the district court found the District in violation of federal law, pendent jurisdiction over the local law claims would still exist, and the extensive violations of local law would support the decree.

Having made a shambles of *Gibbs* step two and of *Rosado v. Wyman*, the majority lays waste to what remains of the law of pendent jurisdiction. Unlike plaintiffs in any other case ever decided by the federal courts, the plaintiffs here may retain their victory on their local law claims only if it turns out that they had "winning" federal claims. Maj. op. at 18. "Winning"? Where does this idea come from? *Gibbs* and the cases following it require only that the federal claim asserted in the complaint be "substantial," that is, that it "have substance sufficient to confer subject matter jurisdiction on the court," a principle derived from *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933). *Gibbs*, 383

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stage for yet another appeal, and the district judge must be as baffled as I am by this court's conflicting commands.

U.S. at 725. According to *Levering*, "jurisdiction, *as distinguished from merits*, is wanting where the claim set forth in the pleading is plainly unsubstantial . . . either because [it is] obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of [the Supreme] court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 289 U.S. at 105–06 (italics added) (quoting *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910)). A federal question is therefore "substantial" for purposes of pendent jurisdiction if it is not "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," or "no longer open to discussion." *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (internal quotation marks and citations omitted); *see also District of Columbia Common Cause*, 858 F.2d at 10; *Town of W. Hartford v. Operation Rescue*, 991 F.2d 1039, 1049 (2d Cir.), *cert. denied*, 114 S. Ct. 185 (1993); Matasar, *supra*, 71 CAL. L. REV. at 1419. The Court explained in *Hagans*: "The limiting words 'wholly' and 'obviously' have cogent legal significance.... [T]hose words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial...." 415 U.S. at 537–38.

In requiring the district court to find a "winning" federal claim as a prerequisite to exercising jurisdiction over pendent local law claims, my colleagues have thus overruled the Supreme Court's decisions in *Levering*, *Hagans*, and *Gibbs*—a tall order for two judges of an inferior federal court.

Given their treatment of Supreme Court precedents, it is little wonder that my colleagues also mow down two decisions of this court bearing directly on the issue they think needs deciding. In *District of Columbia Common Cause v. District of Columbia*, 858 F.2d at 10, we upheld solely on pendent local law grounds an injunction against the District of Columbia prohibiting it from spending public funds to oppose citizens' initiatives. Far from determining whether a winning federal claim supported the injunction, we refused to decide

the merits of the federal claim (much as did the panel in *LaShawn I*) because it was not "so attenuated and unsubstantial as to be absolutely devoid of merit," and was therefore substantial enough to support the pendent claims. *Id.* (citation omitted). *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986), is to the same effect. We there reversed the district court's ruling that a District of Columbia statute violated federal law. Although the federal claim was a loser, we considered it "substantial enough" to allow us to exercise jurisdiction over the pendent local law claim and to decide it, which we did. 792 F.2d at 188.[8]

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[8] The majority relies on *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 1831 (1994) (*Evans III*), to support its conclusion that the second part of the *Gibbs* analysis is a jurisdictional inquiry. *Evans III* is not on point. The Seventh Circuit reached the result it did because no substantial claim *whatsoever*—federal or local—underlay the district court's order. *Evans III* does not even discuss the question of pendent jurisdiction, since the only local claims at issue there were part of the plaintiffs' constitutional due process theory. 10 F.3d at 476. A prior appellate panel, *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989) (*Evans II*), rejected both of the plaintiffs' constitutional challenges to the City of Chicago's practice of paying some judgments earlier than others. That panel explicitly held that the City had not violated the Constitution's guarantee of equal protection, *id.* at 1015–18, and according to *Evans III*, there was "little doubt that *Evans II* would have repulsed a due process argument had the plaintiffs presented it for decision," 10 F.3d at 480–81. Given the absence of a substantial federal claim, the *Evans III* court held that the district court had no jurisdiction to enforce the consent decree. The "bare consent of the officeholder" was not a sufficient basis for imposing obligations on the City. *Id.* at 479.

Here, it is not the "bare consent" of the District that supports the consent decree. As this court held, the decree rests on the District's flagrant and repeated violations of District of Columbia law. *LaShawn I*, 990 F.2d at 1325. For purposes of this appeal, *Evans III* demonstrates, if anything, only that the first part of the *Gibbs* inquiry—the substantiality of the underlying federal claim—is jurisdictional.

The majority ignores *Dimond* but attempts to distinguish *District of Columbia Common Cause* on the ground that the injunction there was somehow inoffensive to the notion of "comity" the majority tries to fashion out of its favorite recurring *non sequitur*, *Pennhurst II*. Maj. op. at 17–18. *Pennhurst II is* an exceedingly odd, indeed astonishing, source for the majority's views on the comity this court owes local District of Columbia courts. Odd because *Pennhurst II* dealt with something no one would have dreamed this case

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Nor does *Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993), support the majority's holding. In that case, as here, the federal claims against the governor of Arkansas and the director of the state's Department of Human Services were based in the Constitution, the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–628, 670–679, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106a. 999 F.2d at 322. The court recognized the uncertainty of the constitutional claims of those children not in foster care. Moreover, it noted that the analysis in *Suter v. Artist M.*, 503 U.S. 347 (1992), "might ultimately compel the conclusion that the ... federal statutes upon which plaintiffs rely do not create an enforceable private right of action on their behalf." 999 F.2d at 323, 324. Nevertheless, because these questions went to the merits of the plaintiffs' claims and did not "inescapably render the claims frivolous," it held the district court clearly had jurisdiction to enter a consent decree resolving the dispute. *Id.* at 324 (internal quotation marks and citation omitted). Thus, as to the question whether the plaintiffs here have federal claims substantial enough to support the district court's exercising pendent jurisdiction over their local law claims, *Angela R.* supports a conclusion directly contrary to the majority's.

The problem in *Angela R.* was not jurisdictional, but centered on "future enforcement of [the] obligations" imposed by the decree. *Id.* The Eighth Circuit concluded that the consent decree did not resolve specifically enough how it was to be enforced, and that the district court therefore abused its discretion in approving it. *Id.* at 325. Because *Angela R.* was a suit against state officials, Eleventh Amendment concerns made it particularly important that the decree's enforcement provisions were consensual and plain. *Id.* at 325–26. Those concerns are not present here. *See infra* pp. 17–18.

involved—the Eleventh Amendment to the Constitution. Exceedingly odd because the Eleventh Amendment confers immunity on the states from certain suits in federal court, and when last I checked, the District of Columbia was not a state. Astonishing because the majority nonetheless finds that *Pennhurst II* and the Eleventh Amendment somehow "suggest that, in general, injunctions against nonfederal officials based on nonfederal law should be disfavored." Maj. op. at 15–16.

It is hard to take this seriously. The Eleventh Amendment prohibits federal courts from entertaining "suit[s] in law or equity, commenced or prosecuted against *one of the United States*." U.S. CONST. amend. XI (italics added). That eliminates the District of Columbia. I would have thought that judges in this circuit needed no reminding that the District is not a sovereign state, separate from the federal government. It is the seat of our national government, and it is subject to Congress' plenary authority under Article I, Section 8, Clause 17 of the Constitution.[9] *See Palmore v. United States*, 411 U.S. 389, 397 (1973). Although inhabitants of the District today possess, to some degree, the power of self-government, District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973), they hold that power at Congress' forbearance, and it is far from absolute. Congress has "reserve[d] the right, at any time, to exercise its constitutional authority as legislature for the

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[9] For purposes of 42 U.S.C. § 1983, Congress has indicated that the District of Columbia should be treated as a municipal government. H.R. REP. No. 548, 96th Cong., 1st Sess. 2 (1979). After noting that municipalities may be liable for § 1983 violations under *Monell v. City of New York*, 436 U.S. 658 (1978), the House report stated: "That decision leaves the District of Columbia government and its officers as the only persons in the United States or its territories who are not subject to Section 1983 liability." H.R. REP. No. 548, *supra*, at 2. By contrast, § 1983 does not abrogate the Eleventh Amendment immunity accorded to States. *Quern v. Jordan*, 440 U.S. 332, 340–41 (1979); *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam).

District, by enacting legislation for the District on any subject . . . including legislation to amend or repeal any law in force in the District . . . and any act passed by the [District] Council." *Id.* § 601. The District government must submit any law it enacts to Congress, which can disapprove the law within 30 days. *Id.* § 602(c)(1). The District may make no expenditures, even of funds it raises through its own means of revenue collection, unless approved by an act of Congress. *Id.* § 446.

The District is thus a distinctly federal entity, "truly *sui generis* in our governmental structure." *District of Columbia v. Carter*, 409 U.S. 418, 432 (1973). A suit in federal court against a federal entity "is hardly the instrument of a distant, disconnected sovereign," *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 401 (1994), and thus raises none of the concerns that underpin the Eleventh Amendment or the Supreme Court's application of it in *Pennhurst II*. Accordingly, the cases the majority cites concerning the comity owed states—*Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993), and *Evans v. Buchanan*, 468 F. Supp. 944 (D. Del. 1979)—are irrelevant here.[10]

Stripped of their faulty Eleventh Amendment underpinnings, my colleagues' views on the comity owed District of Columbia courts turn solely on their misunderstanding of the *Gibbs* step two analysis. The majority seems to think that the existence of local law claims automatically counsels against the exercise of jurisdiction over them. If that were true, pendent jurisdiction would never exist. But as this court has made clear, it is the extent to which a local law issue is "novel and unsettled"—and not its mere existence—that might counsel against the exercise of jurisdiction. *Com-*

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[10] *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 28 F.3d 130 (D.C. Cir. 1994), is likewise of little value here because it concerned not the comity federal courts owe District of Columbia courts, but the respect owed the District's administrative agencies in a statutory scheme in which Congress specifically said that the District of Columbia should be treated like a state. *See* 28 F.3d at 132 n.1.

pare Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 775 (D.C. Cir. 1982) (district court abused its discretion in exercising pendent jurisdiction over "novel and unsettled" local law issues) *and Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984) (rejecting pendent jurisdiction over "novel and unsettled" local law issues) *with Dimond v. District of Columbia*, 792 F.2d at 189 (where local law issues were neither novel nor unsettled, uncertainty in local law could not weigh heavily against the exercise of pendent jurisdiction). The majority has identified no such "novel and unsettled" local law issues at stake here. To do so now, it would have to overrule yet another portion of *LaShawn I*, in which this court held that District of Columbia law clearly provides private causes of actions for all of the children in the plaintiff class. 990 F.2d at 1326.

B

This brings me to the majority's treatment of *Suter v. Artist M.*, 503 U.S. 347 (1992), and the statute Congress passed in the wake of that decision.

Suter held that one of the provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–627 and §§ 670–679 ("the Act"), upon which plaintiffs have relied, could not be enforced through a private cause of action. In light of the Court's holding with respect to that provision—42 U.S.C. § 671(a)(15)—the majority suggests that the substantiality of the federal claims asserted by those plaintiff children who are not in custody may be undermined because, in view of *Suter*, they may not be able to enforce any of the Act's provisions.[11] Maj. op at 26. And so the majority instructs the district court, on remand, to consider the effect of *Suter*.

That instruction collides with 42 U.S.C. § 1320a–2, a 1994 statute severely limiting *Suter*. The statute provides:

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[11] The district court found the District in violation of six provisions of the Act. *See infra* note 13.

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

Id. Theorizing that Congress may have been "misled" or "confused" by the language of *Suter* (maj. op. at 24–25), my colleagues essentially conclude that this statute has no effect at all. Maj. op. at 25–26. They claim that the first sentence of § 1320a–2 means nothing because *Suter* did not turn solely on the fact that the provision at issue was included in the state plan requirement. That point might be well taken, but what about the next sentence? There, Congress specifically directed the federal courts to use the same "grounds for determining the availability of private actions" they used before *Suter* and to disregard any new grounds the Supreme Court first applied in *Suter*. This direction may be understood only in light of the dissenting opinion in *Suter*, which claimed that the *Suter* majority had "changed the rules of the game" for finding private rights of action under § 1983. *See* 503 U.S. at 377 (Blackmun, J., dissenting). Rightly or wrongly, Congress credited the dissenters' view. "The intent of this provision," the Conferees stated, "is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts *to the extent they were able to prior to the decision in Suter v. Artist M.*...." H.R. CONF. REP. NO. 761, 103d Cong., 2d Sess. 926 (1994) (italics added). Two district courts have considered § 1320a–2 and have so read the provision. *See*

Harris v. James, 883 F. Supp. 1511, 1519 (D. Ala. 1995) (explaining that in § 1320a–2, Congress "mandated that courts continue to apply a pre-*Suter* approach"); *Jeanine B. ex rel. Blondis v. Thompson*, 877 F. Supp. 1268, 1283 (D. Wis. 1995) (explaining that § 1320a–2 requires courts to " 'rewind the clock' and look to cases prior to *Suter* to determine the enforceability of other provisions").[12]

My colleagues see things differently. They say that because Congress did not identify the specific *Suter* "grounds" it wished to reject, it must not have meant to reject any grounds. Maj. op. at 26. Even if that argument made any sense, it still would directly contradict both the language of the *Suter* amendment, which overturns "any such grounds" applied in *Suter* but not applied in prior Supreme Court decisions, *see* 42 U.S.C. § 1320a–2, and the "hornbook law" presumption against "interpreting a statute in a way which renders it ineffective," *see Federal Trade Comm'n v. Manager, Retail Credit Co., Miami Beach Branch Office*, 515 F.2d 988 (D.C. Cir. 1975).

In short, Congress has directed the federal courts not to consider *Suter* in deciding whether there may be private enforcement of the Act, while my colleagues have directed the district court to do just the opposite.

Congress' command raises constitutional problems of its own. Congress may not prescribe rules of decision for cases pending in the federal courts. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–48 (1871); *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1314–15 (9th Cir. 1990), *rev'd on*

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[12] Before *Suter*, federal courts had sustained private actions brought under 42 U.S.C. § 1983 to enforce the Act's provisions. *See, e.g., Timmy S. v. Stumbo*, 916 F.2d 312, 316 (6th Cir. 1990) (determining that the "reasonable promptness" provision of 42 U.S.C. § 671(a)(12) is enforceable under 42 U.S.C. § 1983); *L.J. ex rel. Darr v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989) (holding the substantive requirements listed in § 671(a)(9), (10) & (16) enforceable under § 1983); *Lynch v. Dukakis*, 719 F.2d 504, 512 (1st Cir. 1983) (concluding that the case plan requirements of § 671(a)(16) and § 675(1) & (5)(B) are enforceable under § 1983).

other grounds, 503 U.S. 429 (1992). *But cf. Plaut v. Spendthrift Farms, Inc.*, 115 S. Ct. 1447, 1457 (1995). And it is far from certain whether Congress may, consistent with principles of separation of powers and the independence of the judicial branch, direct the lower federal courts to disregard the reasoning of an otherwise binding Supreme Court decision.

There is no reason why the district court, and ultimately this court, should have to ponder this serious question or the other constitutional issues the majority sends back to it, issues raised by the dictum in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), with respect to the in-custody children. Maj. op. at 18 n.9. For more than a century, the Supreme Court has endorsed the practice of deciding cases on the basis of a pendent state-law claim in order to avoid constitutional questions. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909); *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886). *Pennhurst II* itself stressed that nothing in its decision regarding the immunity of states under the Eleventh Amendment was "meant to cast doubt on the desirability of applying the principle [of avoiding constitutional questions] in cases where the federal court has jurisdiction to decide the state-law issues." 465 U.S. at 118–19 n.28. And in a later case, the Supreme Court held that it was an abuse of discretion for a court of appeals to reach a federal constitutional question when it could have avoided doing so by deciding the case on pendent state-law grounds. *Schmidt v. Oakland Unified Sch. Dist.*, 457 U.S. at 595.

The majority opinion turns the table upside down. Again ignoring higher authority, the majority orders the district court to abuse its discretion by deciding the constitutional issues.

IV

It is time to bring this opinion to a close. The majority's opinion disregards the law of this court and of the Supreme Court. My colleagues do not like the idea of a federal district

court issuing a decree to govern local institutions. Nor do I, nor, for that matter, does the district judge in this case. But we are sworn to uphold the law. I therefore dissent.

ADDENDUM

The case went to trial four years ago. Two weeks of testimony revealed the District of Columbia's deficient, inept administration of its foster care system. This testimony, together with more than a thousand admissions of fact by the District, showed that District officials had consistently failed to carry out responsibilities imposed on them by federal and local laws. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960, 986–87 (D.D.C. 1991). These were far from minor infractions. The transgressions psychologically, emotionally and physically harmed those children in the District's foster care system and those children who, although not yet in the District's care, were known to the District because of reported abuse and neglect. *Id.* at 987.

The district court thus reached the "inescapable conclusion" that the District's foster care system complied with neither "federal law, District law, [n]or, for those plaintiffs in the District's foster care, the United States Constitution." *Id.* at 960–61. The District's administration of its foster care system violated numerous provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–627 and §§ 670–679, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106.[13] The Adoption Assistance Act,

[13] Specifically, the court found the District in violation of the following requirements imposed upon recipients of federal funding for child welfare programs: (1) 42 U.S.C. § 5106a(b)(2) (requiring prompt investigations into reports of abuse or neglect and necessary action to protect welfare of abused or neglected children), 762 F. Supp. at 968–70; (2) 42 U.S.C. § 5106a(b)(3) (requiring demonstration of program to ensure effective treatment of child abuse and neglect cases), 762 F. Supp. at 970; (3) 42 U.S.C. § 671(a)(15) (requiring provision of services to enable a child for whom a report has been made to remain in the home or, if removal is necessary, to

the court held, conferred upon the plaintiffs rights that were privately enforceable under 42 U.S.C. § 1983, which the District had violated by depriving plaintiffs of those rights. 762 F. Supp. at 988–90.

The district court also found that the District's operation of its foster care system violated numerous provisions of the District's Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2–22 (Sept. 23, 1977) (codified as amended at D.C. CODE ANN. §§ 2–1351 to –1357, §§ 6–2101 to –2107, §§ 6–2121 to –2127, and §§ 16–2351 to –2365); the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6–139 (Aug. 13, 1986) (codified as amended at D.C. CODE ANN. §§ 3–801 to –808); and the Child and Family Services Division Manual of Operations (September 1985). The District's obligations under its own laws parallel almost exactly the requirements of federal law. *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1324 (D.C. Cir. 1993) ("*LaShawn I*"). Analogizing the rights of children in foster care to rights of those involuntarily committed, *LaShawn*, 762 F. Supp. at 992, the district court ruled that these laws conferred liberty and property interests, protected under the Fifth Amendment, on the children in the custody of the District's foster care system, *id.* at 994. The District had violated § 1983 by depriving the children in foster care of these constitutionally protected interests. 762 F. Supp. at 998.

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enable the child to return home as quickly as possible), 762 F. Supp. at 970; (4) 42 U.S.C. § 672(e) (mandating that a child return home within 180 days unless a judicial determination has been made that foster care placement is in the child's best interests), 762 F. Supp. at 971; (5) 42 U.S.C. § 675(5)(A) (requiring procedures to assure children are placed in least restrictive settings), 762 F. Supp. at 971; (6) 42 U.S.C. § 675(1) (requiring timely preparation of case plans containing specific information), 762 F. Supp. at 972–73; (7) 42 U.S.C. § 675(5)(B) (requiring review of child's status at least every six months), 762 F. Supp. at 974; and (8) 42 U.S.C. § 627(a)(2)(A) (requiring operation of information system from which status, location and goals for placement of all foster care children may be readily determined), 762 F. Supp. at 976–77.

The parties worked out a remedial order designed to correct deficiencies in the District's administration of its foster care system, and the district court entered it.

The District appealed, contending that the district court erred in finding that the administration of the District's foster care system violated the Fifth Amendment and that the intervening decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), precluded any private cause of action under § 1983 or federal child welfare statutes. *LaShawn I*, 990 F.2d at 1321–22. Recognizing that the appeal raised "complex constitutional and federal statutory issues," we held that it was unnecessary to reach the District's challenges. *Id.* at 1324. Under District law, children reported to have been abused or neglected had a private right of action under the District's Prevention of Child Abuse and Neglect Act. *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987). Because a government owes greater duties toward those in its custody, we concluded that the children in the District's foster care system also had a private right of action under the Act. *LaShawn I*, 990 F.2d at 1325. In addition, we noted that the other District statute relied on by the children, the Youth Residential Facilities Licensure Act, explicitly provides these children with a private cause of action to sue under the Prevention of Child Abuse and Neglect Act. *Id.* at 1325–26. These statutes, we held, "provide[d] an independent basis for supporting the district court's judgment." *Id.* at 1326. This court's authority to decide the case entirely on the pendent local claims, we stated, was "incontrovertible" under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *In Banc* May 8, 1996 Decided July 9, 1996

No. 94–7044

LaShawn A., et al.,
Appellees

v.

Marion S. Barry, Jr., et al.,
Appellants

Appeal from the United States District Court
for the District of Columbia
(89cv01754)

Donna M. Murasky, Assistant Corporation Counsel, argued the cause for appellants. With her on the briefs were *Charles F. Ruff,* Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel. *Garland Pinkston, Jr.,* Principal Deputy Corporation Counsel at the time the briefs were filed, and *Vanessa Ruiz,* Assistant Corporation Counsel, entered appearances.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Marcia R. Lowry argued the cause for appellees. With her on the brief were *Craig R. Levine* and *Arthur B. Spitzer*. *Christopher T. Dunn* entered an appearance.

A. Duncan Whitaker and *Suzan J. Aramaki* were on the brief for *amicus curiae* Jerome G. Miller, as General Receiver.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* WILLIAMS, in which *Circuit Judge* HENDERSON joins.

RANDOLPH, *Circuit Judge:* In this ongoing litigation over the District of Columbia's foster care system, we granted rehearing *in banc* to decide whether one panel of this court may reconsider a prior panel's decision directing the district court to exercise pendent jurisdiction in the case. The answer is no.

I

In 1989, plaintiffs brought this class action on behalf of the abused and neglected children who rely on the District of Columbia's foster care system. They alleged that the defendants—the mayor and other high-level District officials—were responsible for widespread violations of their rights under the United States Constitution, various federal statutes, and a long list of local laws. Two weeks of trial testimony revealed the District of Columbia's deficient and inept administration of its foster care system. The testimony, and more than a thousand admissions of fact by the District, showed that District officials had consistently failed to carry out responsibilities imposed on them by federal and local laws. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 960, 986–87 (D.D.C. 1991).

The district court reached the "inescapable conclusion" that the District's foster care system complied with neither "federal law, District law, [n]or, for those plaintiffs in the District's foster care, the United States Constitution." *Id.* at 960–61. The District's administration of its foster care system violated numerous provisions of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–627 and §§ 670–679, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106.[1] The Adoption Assistance Act, the court held, conferred upon the children rights that were privately enforceable under 42 U.S.C. § 1983, which the District had violated by depriving the children of those rights. 762 F. Supp. at 988–90. The district court also found that the District's operation of its foster care system violated numerous provisions of the District's own Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2–22 (Sept. 23, 1977) (codified as amended at D.C. CODE ANN. §§ 2–1351 to

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[1] Specifically, the court found the District in violation of the following requirements imposed upon recipients of federal funding for child welfare programs: 42 U.S.C. § 5106a(b)(2) (requiring prompt investigations into reports of abuse or neglect and necessary action to protect welfare of abused or neglected children), 762 F. Supp. at 968–70; 42 U.S.C. § 5106a(b)(3) (requiring demonstration of program to ensure effective treatment of child abuse and neglect cases), 762 F. Supp. at 970; 42 U.S.C. § 671(a)(15) (requiring provision of services to enable a child for whom a report has been made to remain in the home or, if removal is necessary, to enable the child to return home as quickly as possible), 762 F. Supp. at 970; 42 U.S.C. § 672(e) (mandating that a child return home within 180 days unless a judicial determination has been made that foster care placement is in the child's best interests), 762 F. Supp. at 971; 42 U.S.C. § 675(5)(A) (requiring procedures to assure children are placed in least restrictive settings), 762 F. Supp. at 971; 42 U.S.C. § 675(1) (requiring timely preparation of case plans containing specific information), 762 F. Supp. at 972–73; 42 U.S.C. § 675(5)(B) (requiring review of child's status at least every six months), 762 F. Supp. at 974; and 42 U.S.C. § 627(a)(2)(A) (requiring operation of information system from which status, location and goals for placement of all foster care children may be readily determined), 762 F. Supp. at 976–77.

–1357, §§ 6–2101 to –2107, §§ 6–2121 to –2127, and §§ 16–2351 to –2365); the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6–139 (Aug. 13, 1986) (codified as amended at D.C. CODE ANN. §§ 3–801 to –808); and the Child and Family Services Division Manual of Operations (Sept. 1985). The District's obligations under its own laws parallel the requirements of federal law; indeed the District law requirements are, in many respects, more stringent than those in the corresponding federal statutes. Analogizing the rights of children in foster care to rights of those involuntarily committed, *LaShawn*, 762 F. Supp. at 992, the district court ruled that the District's laws conferred liberty and property interests, protected under the Fifth Amendment, on the children in the custody of the District's foster care system, *id.* at 994, and that the District had violated § 1983 by depriving the children in foster care of these constitutionally protected interests. 762 F. Supp. at 998.

The parties worked out a remedial order to correct deficiencies in the District's administration of its foster care system, and the district court entered it.

In the remedial order, the District specifically reserved the right to appeal the district court's liability ruling. The District invoked that right almost immediately, contending before this court (1) that the district court erred in finding that the administration of the District's foster care system violated the Fifth Amendment, and (2) that the intervening decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), precluded any private cause of action under § 1983 or federal child welfare statutes. A unanimous panel of this court held, however, that it was unnecessary to reach those "complex constitutional and federal statutory issues." *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1324 (D.C. Cir. 1993) ("*LaShawn I*"), *cert. denied*, 114 S. Ct. 691 (1994). Under District law, children reported to have been abused or neglected had a private right of action to enforce the District's Prevention of Child Abuse and Neglect Act. *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987). Because a government owes greater duties toward those in its custody, the panel concluded that the children in the District's foster care system also had a private

right of action under the Act. *LaShawn I*, 990 F.2d at 1325. In addition, the panel noted that the other District statute relied on by the children, the Youth Residential Facilities Licensure Act, explicitly provides these children with a private cause of action to sue under the Prevention of Child Abuse and Neglect Act. *Id.* at 1325–26. These statutes, the panel held, "provide[d] an independent basis for supporting the district court's judgment." *Id.* at 1326.

Accordingly, rather than reach the difficult constitutional and federal statutory questions, the *LaShawn I* panel remanded the case to the district court "with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible." *Id.* The panel explained that the District's statutory and regulatory scheme was "appropriately before us under our pendent jurisdiction," *id.* at 1324, and that federal judicial authority to decide the case on pendent grounds was "incontrovertible," *id.* at 1326.

The District sought rehearing from that decision. The panel denied the petition. *LaShawn A. v. Dixon*, No. 91–7159 (D.C. Cir. Aug. 9, 1993). The District suggested rehearing *in banc*. It did not get the votes. *LaShawn A. v. Dixon*, No. 91–7159 (D.C. Cir. Aug. 9, 1993). The District asked the Supreme Court to review the decision. Its petition for writ of certiorari was denied. *Kelly v. LaShawn A. ex rel. Moore*, 114 S. Ct. 691 (1994).

On remand, the district court sought to comply with the direction of *LaShawn I* by entering a modified remedial order based on local law. *LaShawn A. v. Kelly*, Civ. No. 89–1754 (D.D.C. Jan. 27, 1994). The District of Columbia appealed again, this time arguing that (1) under both the terms of the parties' agreement and general principles of contract law, the original remedial order should have been vacated because *LaShawn I* had "not affirmed" the district court's finding of liability under federal law, and (2) the modified remedial order was not "based on" local law as required by *LaShawn I*.

Rather than confront those issues, a divided panel of this court remanded the case to the district court to "re-examine"

its exercise of pendent jurisdiction over the claims arising under local law. *LaShawn A. v. Barry*, 69 F.3d 556, 570 (D.C. Cir. 1995) ("*LaShawn II*"), *vacated and reh'g in banc granted*, 74 F.3d 303 (D.C. Cir. 1996). The *LaShawn II* majority acknowledged that *LaShawn I* explicitly decided that the district court had the "power" to exercise pendent jurisdiction under the first step of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). 69 F.3d at 560. The *LaShawn II* majority also acknowledged that the *LaShawn I* panel had decided—by necessary implication—that an exercise of pendent jurisdiction was appropriate under *Gibbs* step two. *Id.* Nonetheless, the *LaShawn II* majority concluded that it was free to revisit *LaShawn I*'s *Gibbs* step two decision because, it said, the law-of-the-case doctrine does not preclude reconsideration of "jurisdictional" questions decided but "not explicitly addressed" in a prior appeal. *Id.* at 562.

Upon the plaintiffs' suggestion, we granted rehearing *in banc* and vacated the judgment of the *LaShawn II* majority. *LaShawn A. v. Barry*, 74 F.3d 303 (D.C. Cir. 1996). We then directed the parties to brief the following question:

> Under either the law-of-the-case doctrine or law-of-the-circuit doctrine, did the decision in *LaShawn I*, 990 F.2d 1319 (D.C. Cir. 1993), preclude the panel in *LaShawn II*, 69 F.3d 556 (D.C. Cir. 1995), from considering whether the district court could properly exercise its jurisdiction under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)?

LaShawn A. v. Barry, No. 94–7044 (D.C. Cir. Feb. 9, 1996). We now answer that question in the affirmative.

II

Inconsistency is the antithesis of the rule of law. For judges, the most basic principle of jurisprudence is that "'we must act alike in all cases of like nature.'"[2] Two time-

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[2] *Ward v. James*, [1966] 1 Q.B. 273, 294 (C.A.) (quoting Lord Mansfield in John Wilkes' case, *Rex v. Wilkes*, 98 Eng. Rep. 327, 335 (1770)). *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L. J. 747, 758 (1982).

honored doctrines help put that principle into practice. The first is the law-of-the-case doctrine: the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*.[3] The second is the law-of-the-circuit doctrine: the *same issue* presented in a *later case* in the *same court* should lead to the *same result*. Both doctrines play a role in this case.

"When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995); *see also Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). The Supreme Court has instructed the lower courts to be "loathe" to reconsider issues already decided "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

The *LaShawn II* majority identified no such "extraordinary circumstance" to justify reconsideration of *LaShawn I*'s pendent jurisdiction decision, and we are aware of none. There had been no intervening change in controlling legal authority, *see McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996), and the *LaShawn I* decision was not "clearly erroneous." *See*

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[3] Of course, the law-of-the-case doctrine reaches beyond the court that made the first decision. It applies just as strongly to coordinate courts, *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988), and an even more powerful version of the doctrine—sometimes called the "mandate rule"—requires a lower court to honor the decisions of a superior court in the same judicial system. *See Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838).

Christianson, 486 U.S. at 817.[4] Nonetheless, the *LaShawn II* majority thought itself free to revisit *LaShawn I*'s *Gibbs* step two decision on the ground that the law-of-the-case doctrine contains an exception allowing a panel to reexamine any "jurisdictional" question decided, but not extensively discussed, by an earlier panel in an earlier appeal of the same case.

No such exception exists. In *Christianson v. Colt Industries Operating Corp.*—a case involving one circuit's attempt to revisit the transfer decision of another circuit—the Supreme Court specifically rejected any "jurisdictional question" exception to the law-of-the-case doctrine. The Court said:

> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice.

Id. at 816–17 n.5. In reaching that conclusion, the Court rejected *Potomac Passengers Ass'n v. Chesapeake & Ohio Railway*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975), in which this court first suggested that the law-of-the-case doctrine might not preclude reconsideration of jurisdictional questions. *Id.* Before the Supreme Court decided *Christianson*, the lower

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[4] The District now argues that the *LaShawn I* decision was fundamentally flawed because it analyzed pendent jurisdiction under *Gibbs* rather than *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"). But *Pennhurst II* dealt with the Eleventh Amendment to the Constitution, which prohibits federal courts from entertaining "suit[s] in law or equity, commenced or prosecuted against *one of the United States*." U.S. CONST. amend. XI (emphasis added). The District of Columbia is not a state. It is the seat of our national government, subject—as has become increasingly clear of late—to the plenary authority of Congress under Article I, Section 8, Clause 17 of the Constitution. Thus, *Pennhurst II* has no application here. Perhaps that is why the District failed even to mention *Pennhurst II* in its petition for rehearing, suggestion for rehearing *in banc*, and petition for certiorari from *LaShawn I*.

federal courts frequently cited *Potomac Passengers* for the notion that jurisdictional questions are relatively unrestrained by law-of-the-case considerations. In the eight years since *Christianson*, however, references to *Potomac Passengers* have been few and far between. Only two federal courts have relied on *Potomac Passengers*, and then only to bolster the unremarkable conclusion that a district court is free to reconsider its own non-final jurisdictional decisions. *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988); *Travelers Indem. Co. v. Household Int'l, Inc.*, 775 F. Supp. 518, 530 (D. Conn. 1991).[5]

That the jurisdictional question exception of *Potomac Passengers* is no longer good law should come as no particular surprise. Today, this court and other courts of appeals routinely apply law-of-the-case preclusion to questions of jurisdiction, *see, e.g., McKesson Corp.*, 52 F.3d at 350; *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1151 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989), and do so even when the first decision regarding jurisdiction is less than explicit. *See, e.g., In re Memorial Estates, Inc.*, 950 F.2d 1364, 1367 (7th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992). The dissent complains that the *LaShawn I* panel did not explicitly discuss the *Gibbs* step two question, except to say that pendent jurisdiction was "incontrovertible." 990 F.2d at 1326. But the Supreme Court's holding in *Christianson* renders the dissent's complaint irrelevant. The law-of-the-case doctrine, the Supreme Court said, turns "on whether a court previously decide[d] upon a rule of law . . . not whether, or how well, it

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[5] The Tenth Circuit recently cited *Potomac Passengers* as support for the argument that the "always-open character of jurisdictional questions" should be "a consideration weighing against" the application of the law-of-the-case doctrine to such questions. *Wilmer v. Board of County Comm'rs*, 69 F.3d 406, 410 n.3 (10th Cir. 1995). The *Wilmer* court did not adopt that view, however; it held only that the law-of-the-case doctrine does not preclude consideration of questions—jurisdictional or otherwise—that were *not* decided in a prior appeal. *Id.* at 409–10. Because the *LaShawn I* panel in fact necessarily decided the *Gibbs* step two question (dissent at 3), the *Wilmer* holding has no application here.

explained the decision." 486 U.S. at 817 (internal quotation marks omitted). We said the same in *Crocker*, 49 F.3d at 739: the law-of-the-case doctrine applies to questions decided "explicitly or by necessary implication." As the dissent acknowledges, the *LaShawn I* panel decided the *Gibbs* step two question "by necessary implication." Dissent at 3. Under *Christianson*, nothing more is required.[6]

The procedural setting of this case calls for an even stronger than usual version of the law-of-the-case doctrine. While law-of-the-case doctrine is a prudential creation of the courts, the law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals. Courts of appeals sit in panels, or divisions, of "not more than three judges" pursuant to the authority granted in 28 U.S.C. § 46(c). The "decision of a division" is "the decision of the court." Revision Notes to 28 U.S.C. § 46 (citing *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941)); *see Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (in banc), *cert. denied*, 507 U.S. 984 (1993). Were matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit. *Textile Mills Sec. Corp.*, 314 U.S. at 335. One three-judge panel, therefore, does not have the authority to overrule another three-judge panel of the court. *E.g., United States v. Caldwell*, 543 F.2d 1333, 1370 n.19 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976). That power may be exercised only by the full court, either through an *in banc* decision, *id.*, or pursuant to the more informal practice adopted in *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

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[6] As the dissent notes (dissent at 3), the Supreme Court said in *Pennhurst II* that it does not consider itself bound by decisions on questions of jurisdiction made *sub silentio* in previous cases "when a subsequent case finally brings the jurisdictional issue" to the Court. 465 U.S. at 119 (internal quotation marks and citation omitted). But that plainly has nothing to do with this appeal. The quoted portion of *Pennhurst II* dealt with the *stare decisis* effect of decisions in *other* cases, not the effect of earlier decisions by the same appellate court in the *same* case.

Because the law-of-the-case doctrine alone precluded the *LaShawn II* panel from revisiting the *Gibbs* decision of *LaShawn I*, we need not delve deeply into the interplay between the law-of-the-case and the law-of-the-circuit doctrines.[7] Suffice it to say that, when both doctrines are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case. *See, e.g., United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984) (explaining that when a prior panel in the same circuit has decided an issue, law-of-the-circuit doctrine supplants law-of-the-case doctrine and precludes reconsideration of that decision in a subsequent appeal, even if the second panel believes the first was wrong), *cert. denied*, 469 U.S. 1158 (1985); *cf. Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1077 (D.C. Cir. 1984) (holding that both the law of the case and the law of the circuit precluded a panel from reconsidering issues resolved in a prior appeal in the same case), *cert. denied*, 469 U.S. 1181 (1985). While the law-of-the-case doctrine offers several exceptions—although not, as we have explained, a "jurisdictional question" one—the law-of-the-circuit doctrine is much more exacting. Whether the law-of-the-circuit doctrine allows reconsideration of a prior decision that was " 'clearly erroneous and would work a manifest injustice,' " *see Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. at 618 n.8), is a question we can leave for another day: in revisiting *LaShawn I*, the *LaShawn II* majority did not identify any

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[7] There are situations in which the law-of-the-case doctrine but not the law-of-the-circuit doctrine applies. If a party fails to raise a point he could have raised in the first appeal, the "waiver variant" of the law-of-the-case doctrine generally precludes the court from considering the point in the next appeal of the same case. *See Crocker*, 49 F.3d at 739–40. The law-of-the-circuit doctrine would not, however, bind another panel. Without a holding on the point, the first panel's decision would have no precedential effect. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

"clear error," and, as we said in discussing the law-of-the-case doctrine, *see supra* p. 7, we do not believe that the *LaShawn I* panel committed one.

Instead, the *LaShawn II* majority claimed that it was free to revisit *LaShawn I* under a "jurisdictional question" exception to the law-of-the-case doctrine. To repeat, no such exception exists. But even if it did, *LaShawn I*'s decision on *Gibbs* step two would not fall within it. As the Supreme Court explained in *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627 (1974), the view of "pendent jurisdiction as something akin to subject matter jurisdiction that may be raised *sua sponte* at any stage and that is capable of aborting prior federal court proceedings is a misreading of the law."

The concept of pendent jurisdiction entails a jurisdictional element, but that is comprised in the first step of the *Gibbs* analysis. *See Wal-Juice Bar, Inc. v. Elliott*, 899 F.2d 1502, 1503 (6th Cir. 1990); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988); *Dimond v. District of Columbia*, 792 F.2d 179, 188 (D.C. Cir. 1986); *Financial Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 772 (D.C. Cir. 1982). Step one of *Gibbs* deals with the court's "power" to hear pendent local law claims—its jurisdiction—when the case raises a "substantial" federal issue and the federal and local law claims "derive from a common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one proceeding." *Gibbs*, 383 U.S. at 725. The federal courts' subject matter jurisdiction, to the extent Congress authorizes it, is derived directly from Article III, Section 2, extending the judicial "Power" to "all Cases in Law and Equity arising under this Constitution, the Laws of the United States. . . ." U.S. CONST. art. III, § 2; *see also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807 (1986); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395–96 (1980). The doctrine of pendent jurisdiction rests on the idea that the court's jurisdiction over the underlying federal claim

brings the related pendent claims under the scope of Article III because they are part of the same "case" or "controversy." *See Gibbs*, 383 U.S. at 725; *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821–23 (1824). *Gibbs*'s requirements of a substantial federal claim, a common nucleus of operative fact, and the expectation of one trial, 383 U.S. at 725, "serve[ ] as an operational definition of the 'one constitutional "case" ' language." Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1416 (1983).

There can be not the slightest doubt here that the children's claims under federal statutory law, the Constitution, and District of Columbia law all arise from a common set of facts. The district court's jurisdiction—its power—to decide the local law claims thus turned on the substantiality of the underlying federal claims. Whether a court may decide pendent claims is determined on the face of the pleadings. The ultimate disposition of the federal claim is "immaterial on the question of power." 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1, at 114–15 (1995).

Once a district court finds a substantial federal claim, it has jurisdiction over the entire case. The court then must engage in the second step of the *Gibbs* analysis and decide whether to exercise that jurisdiction over the local or state law claims. This aspect of *Gibbs* is not a jurisdictional determination, which is why *Gibbs* held that "pendent jurisdiction is a doctrine of discretion...." 383 U.S. at 726.[8] There is no other way to explain *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 595 (1982), in which the Supreme Court held that a federal court's decision whether to

[8] While it is true that the Supreme Court in *Gibbs* explained that the step two question remains open through "the litigation," *see* dissent at 11, the Court meant only that the question need not be decided forever on the pleadings, but could be reconsidered during pretrial proceedings or even the trial itself. *See Gibbs*, 383 U.S. at 727.

resolve pendent local law claims was to be reviewed for abuse of discretion.[9] Clearly, a question cannot be both discretionary and jurisdictional: the federal courts have no "discretion" to hear cases outside their jurisdiction. The *Gibbs* step two question is thus not "jurisdictional" and would not come under a "jurisdictional" question exception to the law-of-the-case doctrine if such an exception existed.[10]

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[9] Congress has also explicitly recognized the discretionary nature of the second step of the *Gibbs* inquiry. The Judicial Improvements Act, enacted in 1990 and codified in part at 28 U.S.C. § 1367, states:

> . . . in any civil action of which the district courts have original jurisdiction, the district courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (italics added). When the federal claim drops out, the district court has discretion to retain or dismiss the pendent local law claims: "The district courts *may* decline to exercise supplemental jurisdiction over a claim in subsection (a)" for any of the reasons listed in § 1367(c)(1)-(4). 28 U.S.C. § 1367(c) (italics added).

Section 1367 does not apply in this particular case because the children's complaint was filed before the statute's effective date. Still, § 1367's language is instructive in that the provision, *inter alia*, "codified the doctrine of pendent jurisdiction developed by the Supreme Court in the case of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and its progeny." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995); *see also Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1266 (D.C. Cir. 1995).

[10] The dissent suggests that *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990), and *Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), imply that the *Gibbs* step two is jurisdictional. Dissent at 11–12. They do not. Those cases treated as "jurisdictional" only the *Gibbs* "rule" that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *See Gibbs*,

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Our analysis resolves the question we posed: the law-of-the-case and law-of-the-circuit doctrines precluded the panel in *LaShawn II* from revisiting the *Gibbs* step two decision reached in *LaShawn I*. It does not, however, resolve the issues the District raised in its appeal. *See supra* p. 5. Because the *LaShawn II* panel remanded the case to the district court to reexamine the pendent jurisdiction question, it did not address those arguments when the appeal was before it. We remit the appeal to the panel so it may do so now.

So ordered.

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383 U.S. at 726; *Minker*, 894 F.2d at 1361; *Maguire*, 814 F.2d at 1218 n.4.

SILBERMAN, *Circuit Judge, concurring:* I join the majority opinion; I do not think it was clear error for the original panel to have pretermitted the federal statutory and constitutional questions and directed the district judge "to fashion an equally comprehensive order based entirely on District of Columbia law, if possible." The law of the case exception for clear error is only awkwardly applied to a decision of a roughly contemporaneous panel of the same appellate court, which is why the majority is quite right that in this sort of situation we have law of the case plus elements of law of the circuit. Whatever the boundary between clear error and error, however, it surely cannot be clear error for the panel to have not accepted an argument—based on an analogy to *Pennhurst II*—which the District did not make.

Still, I do believe the original panel's disposition was dubious. I think that the implication of *Gibbs'* observation that a federal court should not exercise pendent jurisdiction if the federal claims are dismissed, *see* 383 U.S. at 726, is that the federal claims should be considered first. Ordinarily, of course, federal courts seek to avoid deciding federal constitutional questions, *see Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), but when the alternative is the unseemly prospect of taking over a *state* institution to force compliance with state law, the *Ashwander* doctrine should yield. By deciding *Pennhurst II* on Eleventh Amendment sovereign immunity grounds, the Supreme Court put paid to the prospect of federal courts being used in that fashion against a state. But there still remains the District of Columbia, which, of course, is not a state and therefore not entitled to Eleventh Amendment protection. The District is correct, however, in arguing that whether the panel erred or not depends on whether one is to regard the District as akin to a state under the *Gibbs–Pennhurst II* line. We have traditionally so treated the District, and I think the panel should have done so—at least by deciding the federal questions first so that if they were decided against the plaintiffs, the case could be dismissed.

To be sure, our tradition of treating the District jurisprudentially like a state may be outmoded: the District's "home rule" itself might well be thought a sad failure. Surely those organizations who, as plaintiffs, seek federal judicial control of more and more of the District's governmental functions feed that perception. If home rule is to be abolished, however, it should be done by Congress, not incrementally by federal judges.

WILLIAMS, *Circuit Judge*, with whom HENDERSON, *Circuit Judge*, joins, dissenting: A federal district judge—an exceptionally fine one, it so happens—has taken full command of a major chunk of District of Columbia government, the Child and Family Services Division of the Department of Human Services. Although the law in whose name he runs the department is local, not federal, no opinion of the district court or this court has ever performed the balancing required by *United Mine Workers v. Gibbs*, 383 U.S. 715, 726–27 (1966), for the exercise of pendent jurisdiction. The majority tells us that because of "law of the case," this substitution of judges for elected government must continue into the indefinite future, without any court ever engaging in the balancing required by *Gibbs*. I think not. To me it appears that (1) law of the case does not bar one panel of the court from addressing a jurisdictional issue that a prior panel resolved only implicitly—*without one word* of discussion; and (2) the balancing required for pendent jurisdiction under *Gibbs*'s "second step" is in fact jurisdictional.

* * *

The majority's statement of the history of the litigation prior to the now-vacated panel opinion, Maj. Op. at 2–6, is not inaccurate. But neither is it complete. First, the consent decree negotiated between the parties consists of a 90–page single-spaced code of operations. Thus the degree of federal judicial control is remarkable in its sweep and detail. The District negotiated the decree after and under the pressure of a district court decision on the merits, *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991), but before the Supreme Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992). As *Suter* rejected two of the holdings of the district court—that §§ 671(a)(9) & (a)(15) of the Adoption Assistance Act created rights enforceable under 42 U.S.C. § 1983—with implications for the rest of the court's statutory analysis, the judicial reasoning that compelled the District to embrace the consent decree was obviously vulnerable. Indeed, on the two specific provisions addressed in *Suter*, it was plainly unsustainable. Thus the District had, under pressure that was at

least in part ill-founded, agreed to the most detailed imaginable federal judicial supervision of a major portion of its governance.

Second, the majority does not convey—indeed, it is hard to convey—how absent from the first panel opinion, *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) ("*LaShawn I*"), is any reference to or hint of the balancing required for pendent jurisdiction under the second step of *Gibbs*. The following is its *entire* discussion of pendent jurisdiction:

> Our authority to decide the case entirely on pendent state grounds is incontrovertible. The Supreme Court has held that "where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question ... the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722, 86 S.Ct. 1130, 1137, 16 L.Ed.2d 218 (1966) (quoting *Hurn v. Oursler*, 289 U.S. 238, 246, 53 S.Ct. 586, 589, 77 L.Ed. 1148 (1933)).

990 F.2d at 1326. The only language quoted from *Gibbs* relates exclusively to the first step required by that case; that quotation frames the panel's own language (i.e., the nonquoted part), referring to the court's "authority" to decide the case, which echoes *Gibbs*'s observation that there is "power" in the court to hear the case if the first test is met—the common nucleus of operative facts. See *Gibbs*, 383 U.S. at 725. Accordingly, we are not in any way here dealing with a question "not extensively discussed," see Maj. Op. at 8, but, so far as the balancing required by *Gibbs*'s second step is concerned, a question not discussed at all.

* * *

The status of jurisdictional issues under law of the case. There is, of course, no dispute that law of the case traditionally bars reconsideration even of an issue merely decided "by necessary implication," subject to equally traditional exceptions for decisions found clearly erroneous or working mani-

fest injustice, or, at least in some cases, undermined by an intervening change in controlling authority. Nor can it be doubted that *LaShawn I*'s instruction to the district court to go full speed ahead on the basis of District law resolved the *Gibbs* second step "by necessary implication." After all, as jurisdiction is a necessary predicate to judicial action, regardless of whether any party has attacked jurisdiction, see, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction," regardless of whether any party has raised the issue), any decision to reach the merits implicitly rejects any attacks on the court's jurisdiction. Thus, despite the complete omission of any reference in the briefs in *LaShawn I* to *Gibbs* (or, so far as appears, to pendent jurisdiction at all), and the court's complete non-discussion of *Gibbs*'s second step, by standard reasoning *LaShawn I* is properly said to have found, by necessary implication, that *Gibbs*'s second step was satisfied.

Jurisdictional issues are, of course, special in a number of regards. First, as already noted, a court is not only free but affirmatively obliged to raise the issue of its jurisdiction where it might be in question, even though the parties never dreamed of the issue. Second, judicial decisions *implicitly* rejecting attacks on a court's jurisdiction (or that of a lower court), i.e., ones that proceed to the merits without discussion of jurisdiction, have no precedential force on the jurisdictional point. "When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984) ("*Pennhurst II*").

The first question before the court, then, is whether the special characteristics of jurisdictional issues require any special treatment for purposes of law of the case. This court once took a firm position that they did so—to the point of removing such questions from law-of-the-case analysis, *Potomac Passengers Ass'n v. Chesapeake & Ohio R. Co.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975), and the case was widely cited for

that proposition.[1] As the majority rightly observes, however, the Supreme Court expressed at least a degree of disapproval in a dictum:

> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice. But cf. *Potomac Passengers Assn. v. Chesapeake & Ohio R. Co.*, . . . 520 F.2d 91, 95 n.22 [(D.C. Cir. 1975)].

Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 n.5 (1988).

Since *Christianson*, the cases have been more mixed,[2] and are certainly consistent with the view, which I share, that *Potomac Passengers* overdid it. *Christianson*'s direct impact appears to have been slight, with courts applying its discus-

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[1] See, e.g., *Green v. Dept. of Commerce*, 618 F.2d 836, 839 & n.9 (D.C. Cir. 1980); *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 636 F.2d 531, 532–33 & nn.2–4 (D.C. Cir. 1980); *Acton Corp. v. Borden*, 670 F.2d 377, 379 n.2 (1st Cir. 1982); *Crane Co. v. American Standard*, 603 F.2d 244, 247 (2d Cir. 1979); *EEOC v. Neches Butane Products Co.*, 704 F.2d 144, 147 n.2 (5th Cir. 1983); *Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983); *Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051, 1056 (7th Cir. 1986).

[2] Commentators have apparently not seen *Christianson* as wiping the slate clean. Wright and Miller said in 1981 that "[q]uestions of subject matter jurisdiction are particularly apt to be free of law of the case principles," citing *Potomac Passengers*. Wright & Miller, *Federal Practice and Procedure* § 4478 at 799 n.32 (1981) (under the heading "Suitable to Reconsider"). "In addition to the great importance that is generally attributed to jurisdictional limits, such questions may at times involve *matters of discretion that inherently require reexamination as a case progresses*," *id.* (emphasis added), the latter phrase being apparently an allusion to step two of *Gibbs*. The 1996 Supplement to Wright & Miller does not modify that passage, 1996 Supplement at 704 n.32, and cites *Christianson* under the separate category of "Propriety of Transfer: Transferor reconsideration," *id.* at 694–95 n.26.

sion of law-of-the-case doctrine relating to jurisdictional questions only in the precise context at issue there—application of a transferring court's jurisdictional analysis in a coordinate court to which the case has been transferred.[3] See, e.g., *Ukiah Adventist Hospital v. FTC*, 981 F.2d 543, 546 n.4 (D.C. Cir. 1992) ("Review of a transfer order [including jurisdictional grounds] in a transferee court is exceedingly limited.") (dictum citing *Christianson*); *Wang Laboratories v. Applied Computer Sciences*, 958 F.2d 355, 358 (Fed. Cir. 1992) (accepting case transferred by First Circuit, the court reasoned that "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end"); *Moses v. Business Card Express*, 929 F.2d 1131, 1137 (6th Cir. 1991) (upholding, under *Christianson*, district court's decision to apply law-of-the-case principles to transfer decision made pursuant to forum selection clause; technically venue rather than jurisdictional issue). While post-*Christianson* decisions have sometimes applied law of the case to jurisdictional questions outside the transfer context, in doing so they have neither relied on the *Christianson* dictum nor even expressly considered whether jurisdictional issues called for special treatment. See *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C. Cir. 1995); *In the Matter of Memorial Estates*, 950 F.2d 1364, 1367 (7th Cir. 1991); *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1151 (2d Cir. 1988).

Moreover, at least one circuit that once applied law of the case to a jurisdictional issue without discussion later acknowledged the special character of such issues. In *DiLaura v. Power Authority*, 982 F.2d 73, 77 (2d Cir. 1992), the court held that a district court was not barred by law of the case from reconsidering its own non-final orders, noting that "subject matter jurisdiction is particularly suited for reconsideration." (As Judge Winter noted in a separate opinion, howev-

[3] The lone exception seems to be a case involving personal, not subject matter, jurisdiction. *In the Matter of Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1292 (7th Cir. 1992).

er, the issue was in fact moot because what might have been law of the case for the district court could not have prevented review by the court of appeals, see *id.* at 81.) See also *Matek v. Murat*, 862 F.2d 720, 724 n.1 (9th Cir. 1988) (apparent dictum citing *Potomac Passengers* for the proposition that "[s]ubject matter jurisdiction, because of its intrinsic importance to the judicial power of the federal courts, is particularly suitable for reconsideration").

One post-*Christianson* case, *Wilmer v. Board of County Comm'rs of Leavenworth County*, 69 F.3d 406 (10th Cir. 1995), confronted a problem closely akin to ours. In a prior pass at the case, the majority had disregarded a jurisdictional issue that the dissent had "tentatively" raised. *Id.* at 410. Did this bar the panel from considering it? The court noted that since any merits decision implicitly rejects all jurisdictional attacks, application of law of the case as conventionally articulated would bar all consideration of such issues at any time after an initial final judgment, thereby conflicting with the directive of Rule 60(b)(4) of the Federal Rules of Civil Procedure to provide relief where the judgment is void, as well as the decisions that have applied that rule to overturn jurisdictionally defective final judgments. *Id.* at 409–10. *Wilmer* concluded, therefore, that a jurisdictional issue could be examined where there had been no "*actual* determination" of the issue, *id.* at 409, and obviously did not regard the dissent's raising the issue as satisfying that test, *id.* at 410, even though, under normal assumptions as to how courts work, that necessarily meant that the majority was fully aware of, and had rejected, the contention.

The line drawn in *Wilmer* seems to me sound. Indeed, I do not understand the majority to say that the "necessary implication" aspect of law of the case means that a court's issuance of a final judgment, logically but not expressly based on a positive jurisdictional finding, precludes any later consideration of the issue. Its ruling, insofar as it proceeds under the assumption that *Gibbs*'s second step is jurisdictional (an assumption it ultimately rejects), must rest on the idea that *LaShawn I* "actually" decided that that step was satisfied. But this seems necessarily to rest on a very loose notion of

"actual" decision, far looser than that applied by the court in *Wilmer*. The only evidence of actual decision of the issue in *LaShawn I* is what one might infer from its reference to *Gibbs*, coupled with our knowledge that *Gibbs* involves two steps, not one. But that amounts to no more than silent action, in the face of presumptive awareness of an issue, which *Wilmer* clearly regarded as being less than an "actual" determination.

Alternatively, perhaps the majority means that *Gibbs* is a *unitary* proposition. On this view, a citation to the case and a quote from one of the operative passages articulating step one *ipso facto* constitute an "actual" determination of step two. The theory seems to me a bit metaphysical. If *Wilmer* is right, i.e., more is required to trigger law of the case than action on the merits coupled with a sign of judicial *awareness* of the jurisdictional issue, it must be because some more serious evidence of a mental connection with the issues is necessary. If so, then the idea that the steps of *Gibbs* are unitary seems to be simply a fiction to avoid the requirement that there be evidence of such a mental connection.

The actions of the Supreme Court suggest that mere implicit resolution of a jurisdictional issue should not be binding under law of the case. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) ("*Pennhurst I*"), the Court had cast doubt on the federal basis for a consent decree enforced against state officials, see *id.* at 18–27, and remanded the case to the court of appeals to determine the validity of the federal claims. The Court also remanded state law claims to determine "whether state law provides an independent and adequate ground which can support the court's remedial order," without significant discussion of the issue. *Id.* at 31.

On remand, the court of appeals recognized that the remand order necessarily implied that it would have jurisdiction to enter the order on state law grounds alone. "Implicit in that direction is a holding that the plaintiffs' federal law claims are of sufficient substance to support the exercise of pendent jurisdiction over that Pennsylvania law claim."

Halderman v. Pennhurst State School & Hospital, 673 F.2d 647, 650 (3d Cir. 1982).[4] The court of appeals then acted on the implied permission *Pennhurst I* had given and found that the Pennsylvania statute provided "adequate support for [the order] independent of federal law." 673 F.2d at 656.

Again the Supreme Court reversed, holding that the Eleventh Amendment denies federal courts jurisdiction to order state officials to conform their conduct to state law. 465 U.S. at 117–21. It brushed aside several earlier implicit rulings to the contrary in other cases, explaining that stare decisis principles did not bar its reconsideration of the jurisdictional issue. *Id.* at 119. The decision thus overrode law of the case in the interest of getting the jurisdictional issue right. While the majority did not explicitly address the problem of law of the case, the dissenters did, saying that in reversing the Third Circuit on the second round, "the Court casts aside [the] well-respected doctrine ... of law of the case." 465 U.S. at 165 (Stevens, J., with whom Brennan, Marshall, & Blackmun, JJ., joined, dissenting).

Despite the obviousness of the law-of-the-case issue and the dissent's explicit discussion, the majority disregarded it. It may thus seem inconsistent for me to attach any importance to the Court's action, in view of what I have said, in agreement with *Wilmer*, on the application of law of the case to undiscussed jurisdictional issues. But law of the case is *not* a jurisdictional issue; it merely "expresses the practice of courts," *Christianson*, 486 U.S. at 817 (quotation omitted). Since implicit treatments of non-jurisdictional issues are precedents, see, e.g., *Elcon Enterprises, Inc. v. WMATA*, 977 F.2d 1472, 1484 (D.C. Cir. 1992); *King v. U.S. Dep't of*

[4] When the majority in *Pennhurst II* overturned the Third Circuit's adjudication of the state law claims, the dissenters made the same point about *Pennhurst I*, saying that the majority was reversing "the Court of Appeals because it did precisely what this Court ordered it to do"—reinstate its prior judgment if state law provided an adequate and independent ground to support the remedial order. *Pennhurst II*, 465 U.S. at 126 (Stevens, J., with whom Brennan, Marshall, & Blackmun, JJ., joined, dissenting).

Justice, 830 F.2d 210, 224 (D.C. Cir. 1987), it is appropriate to look to *Pennhurst II* as such. Given the merely "prudential" character of law-of-the-case restrictions, and the doctrine's grounding in concerns of judicial economy, see, e.g., *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739–40 (D.C. Cir. 1995), the Court's action strongly suggests that law-of-the-case considerations, like those of stare decisis, give way to jurisdictional concerns where the initial decision has failed to address the issue explicitly.

The majority alludes briefly to law of the circuit, Maj. Op. at 10–12, but I think its role here is necessarily marginal. While for non-jurisdictional issues a court's unspoken but necessary premise will often be taken as precedent, see *Elcon Enterprises* and *King*, *supra*, I do not read the majority as saying that should be true for jurisdictional decisions. Such a view would run squarely into *Pennhurst II* and kindred cases. Insofar as the majority is saying that the panel-to-circuit relationship calls for extra caution in re-examining once-resolved issues, I agree. It is more unseemly for one group of three members of a court to overturn another group of three than for a single judge, or group of judges, to reject his or their former position. The catch is in the phrase "once-resolved." For the reasons already given, I do not believe that *LaShawn I* can be said *ever* to have resolved the issue of how *Gibbs*'s second step should apply to the present litigation.

Whether Gibbs*'s second step is jurisdictional.* When a federal court is presented with a combination of federal and state claims, it can adjudicate the state law claims only if that is consistent with the two-step analysis outlined in *Gibbs*. 383 U.S. at 725–27.[5] The first step requires the court to evaluate the substantiality of the federal claim and whether the state and federal claims "derive from a common nucleus of operative fact." *Id.* at 725. If these requirements are met, then "there is *power* in the federal courts to hear the

[5] Because this litigation was commenced before December 1, 1990, the new supplemental jurisdiction statute, 28 U.S.C. § 1367 (Supp. V 1993), does not apply.

whole." *Id.* Then—and the analysis may vary at different stages of the litigation—the court is to balance several variables, such as the desirability of a "surer-footed reading of applicable law," the possible predominance of the state-law issues, the degree to which they are tied to matters of federal policy, possible issues of federal preemption and chances of jury confusion. *Id.* at 726–27.

The majority concludes that if the first step is taken and there is "power" in the court, no jurisdictional issue remains. See Maj. Op. at 12–14. This of course encounters a non-trivial linguistic problem: *Gibbs*'s second step is expressly part of the determination of whether there is "pendent jurisdiction," so one might think it followed, as a matter of ordinary language, that it was jurisdictional. It could, however, be a non-merits, non-jurisdictional inquiry, comparable to abstention and related doctrines. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–819 (1976); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494–95 (1942).

A natural place to start is with the origin, the way the Court spoke of *Gibbs* step two in *Gibbs* itself:

> That power need not be exercised in every case in which it is found to exist.... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law....
>
> The question of power will ordinarily be resolved on the pleadings. *But the issue whether pendent jurisdiction has properly been assumed is one which remains open throughout the litigation.* Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited.

383 U.S. at 726–27 (emphasis added). And more recently the Court stated in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988):

> Under *Gibbs*, a federal court should consider and weigh in each case, and *at every stage of the litigation*, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. at 350 (emphasis added).[6] Thus the Court has imputed to the *Gibbs* step two inquiry a characteristic normally possessed by jurisdictional issues and rarely if ever by non-jurisdictional ones—the quality of being open to examination throughout the litigation.

Federal courts of appeals, including this circuit, have followed the Supreme Court's lead and imputed to the *Gibbs* step two inquiry another characteristic of jurisdictional issues—that the court is *obliged* to raise it *sua sponte*. In *Maguire v. Marquette University*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987), the district court had dismissed plaintiff's federal claim before trial and then proceeded to address a pendent state law claim on the merits. Although defendant did not raise a *Gibbs* step two issue on appeal, the Seventh Circuit declared that "because the rule is *jurisdictional*, we are *obligated* to raise it ourselves." *Id.* at 1218 n.4 (emphasis

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[6] Cf. *Evans v. City of Chicago*, 10 F.3d 474, 479 (7th Cir. 1993) (en banc) (holding that mere consent of local officials, without a viable federal claim, could not justify continued enforcement of decree against city) ("[T]he court must ensure that there is a substantial federal claim, *not only when the decree is entered but also when it is enforced*, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder.") (emphasis added).

added). The court then vacated the district court's dismissal of the pendent claim on the merits. This court has likewise treated *Gibbs* step two analysis as jurisdictional and raised the issue *sua sponte*. In *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1361 (D.C. Cir. 1990), the district court had previously dismissed both federal statutory and state contract claims brought under the Free Exercise Clause of the First Amendment. This court held that the district court had correctly dismissed the federal statutory claims, but had incorrectly dismissed the state contract claims on First Amendment grounds. Without prompting, the court proceeded to hold that because the district court had properly dismissed the federal claim before trial, under *Gibbs*'s second step it should also dismiss the pendent state law claim unless it found diversity of citizenship. *Id.*

The majority dispatches *Maguire* and *Minker* by characterizing them as applications of a newly coined *Gibbs* step one-and-a-half—cases where the federal claim survives step one but is dismissed before trial. Maj. op. at 14 n.10. Thus, in its view, the Seventh Circuit's and our treatment of that situation as jurisdictional can't possibly mean that *Gibbs* step two is jurisdictional. But until the majority opinion, no one has perceived this circumstance as involving a special kind of *Gibbs* step; it is simply an instance of *Gibbs* step two so clear that any continued assertion of jurisdiction by the district court would be an abuse of discretion. See *Gibbs*, 383 U.S. at 426.

The majority, if I read it correctly, says that *Gibbs*'s second step cannot be jurisdictional because it is "discretionary." Maj. Op. at 13–14. The analysis would be correct if the set of things that are "jurisdictional" could, as a matter of logic, not intersect with the sets of things that are "discretionary." But that's not true. Characterization of a matter as discretionary, at least in the *Gibbs* context, appears to reflect two closely related points. First, the analysis is highly case-specific, turning on a balance of issues that are typically fact-intensive and as to which the answers range along a spectrum rather than taking a simple yes/no form (e.g., the predominance of

the state-law questions posed and the likelihood of jury confusion). See *Gibbs*, 383 U.S. at 726–27. Second, it follows that it will be difficult for appellate courts to articulate specific rules capable of guiding the trial courts, so that a deferential form of appellate review is suitable. See *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 932–34 (7th Cir. 1989) (en banc); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (approving reasoning of *Mars Steel Corp.*). An issue with those characteristics can, without logical inconsistency, be jurisdictional as well. When an appellate court finds a district court has abused its discretion on *Gibbs*'s second step analysis, it can still—and I think should still—be understood as having resolved a jurisdictional issue. As I said before, what else could it be resolving?

Professor Shapiro, analyzing a very broad range of jurisdictional issues intertwined with discretionary choice (but not mentioning pendent jurisdiction), notes that in such cases there may be a question "whether the Court was construing the applicable statute as not conferring jurisdiction in the particular case, or was it relying on a discretion not to exercise jurisdiction that admittedly existed?" David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 561 (1985). He thus divides the instances of jurisdiction-cum-discretion into two categories, the first jurisdictional (but with the decision recognized as having discretionary characteristics), the second a purely discretionary overlay on a choice of whether to exercise jurisdiction. He goes on to point out that the distinction may be important for purposes of practical matters such as "the ability of the court to raise a question *sua sponte*." *Id.* at 562. Indeed. Here, the practical actions of courts—most specifically the Seventh Circuit in *Maguire* and ourselves (less explicitly) in *Minker*—mark *Gibbs*'s second step as jurisdictional.

Finally, the majority relies on language yanked out of context. It quotes *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974), for the proposition that

> the view of "pendent jurisdiction as something akin to subject matter jurisdiction that may be raised *sua sponte*

> at any stage and that is capable of aborting prior federal court proceedings is a misreading of the law."

Id. at 627, quoted by Maj. Op. at 12. But there the majority was objecting to the dissent's coming up with the idea of a remand to the district court for consideration of state law claims that the majority thought "were wholly tangential to the principal theme" of the lawsuit, *id.* at 624, and that had been dropped by plaintiffs at both stages of appellate review, *id.* Thus the Court was saying only that unlike issues of subject matter jurisdiction, *state law claims* that are susceptible of pendent jurisdiction are not on that account capable of being resurrected at any time, regardless of abandonment by the claimant.

Accordingly, I believe the *Gibbs* step two balancing is properly regarded as jurisdictional and, for that reason, open to consideration in later phases of a lawsuit where it has not been mentioned before.

* * *

There remains the possibility that, if the above analysis is incorrect, *LaShawn I*'s silent resolution of the *Gibbs* step two issue was subject to the exception in law of the case for "clearly erroneous" prior decisions. As author of the panel opinion, I never suggested that *LaShawn I*'s resolution was clearly erroneous and would be most reluctant to impute any such error to my colleagues. Compare p. 9 above (noting the unseemly character of overturning the opinion of a prior panel). Indeed, as my opinion for the panel made clear, there are strong values on both sides of the matter—among them two doctrines of judicial self-abnegation in favor of democratic political processes: deferring resolution of constitutional issues where possible, on the one hand, and keeping life-appointed federal judges from taking over the interpretation and application of democratically chosen local law, on the other. In any event, as *LaShawn I* never detectably addressed *Gibbs*'s second step I have no idea what *Gibbs* step two analysis might be at issue, and thus am ill-positioned to find error, much less clear error, in that decision.

* * *

Because I believe that law of the case does not bar later panels of a court from considering jurisdictional issues that a prior panel has resolved implicitly but not expressly, and that the second step required for pendent jurisdiction under *Gibbs* is indeed jurisdictional for purposes of that principle, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-7044 September Term, 1996
89cv1754

LaShawn A., By her next friend,
Evelyn Moore, et al.,
Appellees

v. FILED DEC 12 1996

Marion S. Barry, As Mayor of
the District of Columbia, et al.,
Appellants

Before: Williams, Henderson, and Randolph, Circuit Judges.

ORDER

Upon consideration of appellants' petition for rehearing filed November 27, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/ Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
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LaShawn A., By her next friend,
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Marion S. Barry, As Mayor of
the District of Columbia, et al.,
Appellants

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges.

ORDER

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

LASHAWN A v. DIXON

MODIFIED FINAL ORDER

[EXCERPTS]

November 18, 1993

* * *

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DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN SERVICES
LaSHAWN A v. DIXON MODIFIED FINAL ORDER

I. NAMED PLAINTIFFS

* * *

C. Plaintiffs and defendants shall attempt to agree on necessary services and plans for the named plaintiffs. If the parties are unable to agree on necessary services and plans for the named plaintiffs, they shall select an independent expert to oversee the cases of the named plaintiffs. Such expert shall have decision-making authority with regard to necessary services and plans. Failure to implement the expert's decisions shall be a violation of this Order.

* * *

II. PROTECTIVE SERVICES

A. The Department of Human Services shall establish, staff and maintain a 24 hour system for receiving and responding to reports of child neglect and abuse which conforms with reasonable professional standards.

B. In conjunction with the Metropolitan Police Department, the Department shall develop and implement written policies and procedures for the cooperative screening and investigation of complaints of alleged child abuse; these policies

and procedures shall remain in effect for as long as the Metropolitan Police Department retains any responsibility for such complaints. At a minimum, these policies and procedures shall require the following:

1. The Department shall be notified of all reports of abuse received by the Metropolitan Police Department.

2. A Department social worker shall accompany the Metropolitan Police Department official or employee in the investigation of all abuse complaints.

* * *

III. SERVICES TO CHILDREN AND FAMILIES

* * *

B. The Department shall provide services in the following manner:

1. To enable children who have been the subject of an abuse/neglect report to remain safely in their own homes;

a. For all families who have been the subject of a report of neglect/abuse that has not been founded, service needs, if any, shall be identified, the family shall be referred to an appropriate agency, and services shall be provided wherever possible.

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* * *

[C.] 2. Reasonable efforts to avoid the need for foster care placement shall be defined as services that cover a range of intensity relating to families' needs, including:

a. Intensive home-based crisis intervention services;
b. Homemaker services (including 24 hour);
c. Parent education/counselling;
d. Mental health services (including day treatment);
e. Substance abuse programs;
f. Housing assistance;
g. Respite care;
h. Day care;
i. Emergency cash assistance;
j. Access to other public benefits;
k. Less intensive family services.

D. Within 240 days of the entry of this Order, the Department shall establish five community based intensive home-based services units with five workers each, who shall have maximum caseloads of 2-4 families, with additional units to be established as determined by the Department and/or under contract by the process described in the section on Resource Development and Contract below.

* * *

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IV. EMERGENCY CARE

* * *

B. Emergency Care shall be used only under the following circumstances:

* * *

5. Emergency Care shall be limited to 21 days, except when circumstances, expressly documented in the case record, strongly suggest that a child can return home within 21 additional days. In those instances in which Emergency Care is extended to 42 days, the worker's Branch Chief must approve the extension in writing. Such circumstances include the active involvement of the parent in a drug treatment program exceeding 21 days or other rehabilitative services which require the parent to be in residence. Where such programs permit children to co-reside with the parent, they shall do so.

6. Within 21 days of any child entering Emergency Care, or 42 days for those children for when Emergency Care has been so extended, the Department shall return the child to the parent or, if grounds exist, the Corporation Counsel shall file appropriate papers with the Superior Court seeking legal custody of the child.

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C. Any parent who has consented to a child being placed in Emergency Care may revoke his or her consent at any time. In those instances in which a parent does revoke consent, the Department shall return the child to the parent if such is appropriate. If returning the child to the parent is not appropriate, the Department must immediately seek legal custody of the child subject to the provisions of D.C. Code Section 16-2301, et seq. The decision to seek court custody of a child who has entered Department custody through Emergency Care does not have to be approved by the worker's Branch Chief or by the Chief of CFSD.

* * *

X. CASE REVIEW SYSTEM

* * *

B. Child Specific Review

1. Administrative Review

* * *

c. Within 180 days of a child's entry into the Department's physical or legal custody and every 180 days thereafter, the Department shall conduct an administrative review of the child's case, regardless of the timing or content of review conducted by the Family Division of the Superior Court:

* * *

2. The defendants shall assure that every child in their physical or legal custody receives a hearing, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living.

a. Within sixty (60) days of the entry of this Order, the Mayor or her designee shall arrange with the Family Division on the Superior Court for the implementation of a process by which the Family Division shall conduct the hearings as is required by section X(B)(2) of this Order. As part of these efforts,

the Mayor shall make all reasonable efforts to implement a process by which the Family Division judges shall be informed of the significance of such hearings.

* * *

XXII. RESERVATION OF DEFENDANTS' APPEAL RIGHTS

A. Nothing in this Order Shall prevent the Defendants from appealing any portion of this Order or the Court's April 18, 1991 Memorandum Opinion assessing liability against the Defendants.

* * *

C. In the event that the court's Memorandum Opinion of April 18, 1991 is vacated on appeal in its entirety, this Order and any subsequent implementation plan or plans shall be null and void. In the event that the court's Memorandum Opinion of April 18, 1991 is vacated on appeal in part, the portions of this Order or any subsequent implementation plan or plans that are directly based on that part of the Memorandum Opinion that is vacated shall be null and void.

Supreme Court, U.S.
FILED
MAY 9 1997
CLERK

(5)

No. 96-1433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,

Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 9, 1997

43 pp

QUESTIONS PRESENTED

I. Whether the court of appeals properly exercised its discretion to rule on pendent claims for injunctive relief against the District of Columbia regarding the District's child welfare system, in order to avoid resolving complex constitutional and federal statutory issues, after substantial judicial resources had already been expended in conducting a full trial on the federal and local law issues, and plaintiffs had prevailed on all those grounds.

II. Whether the district court properly re-entered a consent decree that exceeds the requirements of local law, where the District of Columbia had negotiated and agreed to be bound by the decree even though it exceeded parallel provisions of federal law, and the decree does not exceed local law any more than it exceeds federal law.

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---

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In this class action by children in the District of Columbia's foster care system and children known to the District to be in danger of abuse or neglect, the federal district court ruled that petitioners had committed sweeping violations of federal law, District law, and the Due Process Clause of the Fifth Amendment in their operation of the District's child welfare system. Petitioners then negotiated and agreed to a broad consent order, while preserving their right to appeal the court's liability rulings. Petitioners did not object to -- rather, they affirmatively agreed to -- the scope of the remedial order, provided their liability was upheld on appeal.

The court of appeals declined to pass on the district court's federal statutory and constitutional rulings, but affirmed petitioners' liability under D.C. law. It remanded to the district

court for its consideration whether any provisions in its remedial order were sustainable only under federal law. Petitioners sought review here, urging that the court of appeals should not have exercised pendent jurisdiction over the D.C. law issues. This Court denied *certiorari*.

The district court ruled on remand that its remedial order could be sustained under local as well as federal law. Petitioners on appeal argued that the remedy should be set aside because it exceeds the requirements of D.C. law. The court of appeals rejected that argument, ruling that petitioners had consented to the scope of the remedial order subject only to their appeal on the underlying federal law liability issues, and, their liability having been upheld under the almost identical provisions of local law, their objection to the scope of the remedial decree had essentially been waived.

Petitioners have now returned, repeating the arguments they made in their first petition to this Court that the courts below should have declined to exercise pendant jurisdiction over the D.C. law claims. But nothing has happened since the Court first denied review to warrant *certiorari* now. Nor does petitioners' objection to the scope of the remedy deserve review. Settled precedents of this Court allow governments to agree to do more than the minimum necessary to remedy violations of law, and in any event the court of appeals correctly ruled that, because petitioners had negotiated and agreed to a remedy exceeding the requirements of federal law, they could not object to the same remedy on the ground that it exceeded the parallel requirements of local law.

A. DISTRICT OF COLUMBIA CHILD WELFARE SYSTEM

The D.C. child welfare system, funded by both local and federal revenues, is designed to provide both short-term care

and long-term planning for the care of children whose parents are unable to provide for them. The children who receive or are in need of care under this system have a panoply of legal rights under D.C. and federal statutes and under the United States Constitution. Relevant statutes include the Child Abuse Prevention and Treatment Act,[1] the Prevention of Child Abuse and Neglect Act of 1977,[2] the Adoption Assistance and Child Welfare Act of 1980,[3] and the Youth Residential Facilities Licensure Act of 1986.[4] As the D.C. Circuit noted, the applicable local and federal statutes impose overlapping obligations that "parallel [one another] almost precisely." Petitioners' Appendix (hereinafter "Pet. App.") at 92a. Under these mandates, the District of Columbia is required, for instance, to:

-- promptly investigate reports of suspected child abuse and neglect, and take steps to protect children once reports are made, 42 U.S.C. § 5106a(b)(2); D.C. Code Ann. § 6-2102(b);

-- assure that all children who enter foster care receive written "case plans," 42 U.S.C. §§ 622(b)(9)(B)(ii), 671(a)(16), 675(5); D.C. Code Ann. §§ 6-2107(b),

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[1]Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974) (codified as amended at 42 U.S.C. §§ 5101-06).

[2]D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at D.C. Code Ann. §§ 2-1351-57, §§ 6-2101-07, §§ 6-2121-27 and §§ 16-2351-65).

[3]Pub. L. No. 96-272, 94 Stat. 500 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-28 and §§ 670-76).

[4]D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. Code Ann. §§ 3-801-08).

16-2323(b). The purpose of these plans is to articulate specific goals for the handling of each child's case, and to ensure that children are appropriately placed and cared for and that they remain in foster care no longer than necessary. Pet. App. at 29a;

-- provide children with safe foster care placements and services to assure that they are not harmed while in foster care, 42 U.S.C. § 671(a)(10); D.C. Code Ann. §§ 3-802, 3-803, 3-805; U.S. Const. amend. V;

-- provide services to families to enable children to return home, when appropriate, 42 U.S.C. § 622(b)(9)(B)(iii)(I); D.C. Code Ann. §§ 6-2123(b)(1) & (3), 6-2107(b);

-- enable those children who cannot return home to be adopted or placed in alternative permanent placements outside of government custody, 42 U.S.C. §§ 622(b)(9)(B)(iii)(II), 675(1)(B); D.C. Code Ann. §§ 6-2123(b)(2); and

-- employ and procure sufficient personnel and resources to comply with the mandates of D.C. law, D.C. Code Ann. § 6-2122(c); and maintain staff qualifications, worker caseloads, and supervision requirements consistent with professional standards, *id.* § 5-2122(d).

Petitioners attempt to distract this Court by suggesting that this case involves custody matters routinely handled by the Family Division of the D.C. Superior Court. This is not a child custody case, however, and it does not involve the district court in making determinations regarding parental rights or the placement of children in foster case or into adoption proceedings. Rather, this case involves the claims of a class of several thousand children that the D.C. government, systematically and over a period of years, failed to carry out the

duties imposed by the laws governing the child welfare system as a whole.

B. TRIAL COURT PROCEEDINGS

In 1989, respondent children brought suit in federal court seeking injunctive relief only. During a two-week trial before the Honorable Thomas F. Hogan in 1991, the D.C. government offered virtually no evidence to contest the overwhelming case that the child welfare system was violating local and federal law. Instead, respondents' allegations were confirmed by over one thousand admissions by petitioners, as well as uncontroverted expert testimony about class-wide violations of respondents' rights and about the devastating consequences of those violations to the children. Judge Hogan thus held that the child welfare system "does not comply with federal law, *District law*, or, for those plaintiffs in the District's foster care, the United States Constitution." Pet. App. at 5a (emphasis added).

The district court's ruling was inevitable, given the wholesale failure of the District to comply with the most rudimentary legal requirements. For instance, Judge Hogan found that:

-- For years, the Department had failed to initiate and complete investigations of neglect in a timely manner, as required by 42 U.S.C. § 5106a(b)(2) and D.C. Code Ann. § 6-2102(b), piling up a backlog of thousands of cases of children known to be in potentially dangerous situations. Pet. App. at 21a-24a;

-- Nearly 75% of children in the District's voluntary-care custody had been there more than the 90-day limit imposed by District law and some members of the class had remained there for as long as two years. Pet. App. at 26a;

-- The District failed to provide basic social and medical care services to hundreds of children in foster care;[5]

-- Children in foster care were often given totally inappropriate case planning goals in light of their age. For instance, numerous children were assigned the permanency goal of independent living before they reached age 4. Numerous other children were relegated to the category of permanent foster care before they reached the age of five. Pet. App. at 30a;

-- Of the children for whom the District had determined that adoption was appropriate, over 71% continued to languish in foster care because they had not been referred to the agency's adoption unit in a timely manner. Pet. App. at 35a;

-- The D.C. government failed to staff the agency at levels necessary to make the system work. Dozens of social worker positions that were authorized were left unfilled, leaving those on staff with dangerously high caseloads.[6]

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[5]In the cases of more than one-half of the children in the District's foster-care custody, there was no evidence that they had ever been visited by their social worker, and 149 class members in the District's custody had no social worker at all. Pet. App. at 33a. Since having entered the District's custody, 44% of the children had never had a medical examination, and 79% had not had a dental examination. *Id.*

[6]At the time of trial, 107 of 239 authorized social worker positions within the District's child-welfare agency were vacant. As a result, one worker testified that she was struggling with a caseload of 251 children, making it "impossible for her to visit each child regularly." Pet. App. at 41a.

Judge Hogan found that these widespread systemic failures have had terrible consequences for the children. For instance, named plaintiff LaShawn A. was placed in "emergency care" by her mother when she was thirty months old. Though District law directs that emergency care last no longer than ninety days, LaShawn languished there for two and one-half years, during which time the District never developed a case plan for her and her case was never reviewed, in violation of federal and District of Columbia law. She was placed in a foster home in which she may have been sexually and physically abused, and was diagnosed with severe psychiatric problems by the time she reached age 6. Pet. App. at 51a-52a.

Named plaintiff Kevin E. experienced a similarly disturbing odyssey through the foster-care system. Kevin entered foster care as an infant and was still in government custody at the time of trial -- eleven years later. More than once he was inappropriately returned to his mother, who was an unfit parent. Though the District had concluded soon after he had entered foster care that Kevin should be adopted, District officials never followed mandated procedures to make him available for adoption, thus relegating him to long-term government custody. At the age of eight Kevin told hospital staff that he hated himself, and he placed himself in a trash can and asked to be thrown away. See Pet. App. at 28a, 55a-56a.

On the basis of these and other findings, the district court entered judgment against petitioners. Instead of imposing injunctive relief of his own making, Judge Hogan entered a remedial order negotiated by the parties without the court's involvement. The order preserved the District's right to appeal the liability rulings, providing that the District would be free of its obligations under the consent order if the liability judgment was "vacated on appeal in its entirety." If the judgment was vacated in part, the remedial order would be likewise modified. Petitioners' Lodging Accompanying Petition, tab A § XXII(c).

C. POST-TRIAL LITIGATION HISTORY

1. *LaShawn I*. In the first appeal, the District made only three arguments: that Judge Hogan should have abstained pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971), that its actions did not violate the Constitution, and that there was no private right of action under the applicable federal statutes. The District did not dispute Judge Hogan's findings of widespread violations of D.C. and federal statutes.

Respondents defended the federal liability rulings, and also argued that the undisputed violations of D.C. law provided an independent basis for upholding the consent decree. In reply, the District did not dispute that liability could be sustained on the basis of D.C. law, but merely pointed out, inaccurately, that the district court had not rested its liability ruling on the D.C. law violations. Nor did petitioners argue that the exercise of pendent jurisdiction over the D.C. law claims would be inappropriate in light of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Instead, they offered the unsupported, unexplained assertion that such "matters * * * plainly belong not in a federal court but in the courts of the District of Columbia." Reply Brief (Sept. 8, 1992) at 7-8.

Having practically been invited by the District to affirm on the basis of D.C. law, a panel of the D.C. Circuit did just that. After rejecting the *Younger* abstention argument, the panel determined that it was not necessary to reach the constitutional and federal statutory questions because liability under D.C. law was clear. The panel (Mikva, C.J., Sentelle and Randolph, J.J.) held that its "authority to decide the case entirely on pendent state grounds [was] incontrovertible," and the court affirmed Judge Hogan's decision, remanding "with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible." Pet. App. at 96a-97a. The District unsuccessfully sought rehearing and rehearing

en banc, challenging for the first time the existence of a cause of action under D.C. law. The District then sought *certiorari* and for the first time argued that the exercise of pendent jurisdiction over the D.C. law claims was improper. That petition was denied. *Kelly* v. *LaShawn A. ex rel. Moore*, 510 U.S. 1044 (1994).

2. Remand To The District Court. On remand, the district court re-examined the consent decree as directed by the court of appeals to determine whether any provisions rested solely on federal law. The court found there were none, and re-entered the agreed-upon remedial order with only slight modifications.

3. *LaShawn II* -- The Panel Decision. On appeal from Judge Hogan's reaffirmation of the consent decree, a divided panel of the D.C. Circuit, over a vigorous dissent by Judge Randolph, remanded the case for a re-examination of the pendent jurisdiction issue in view of *Suter* v. *Artist M.*, 503 U.S. 347 (1992). See Pet. App. 105a. The panel did this even though *Suter* was (1) issued prior to *LaShawn I*; (2) addressed extensively in both parties' *LaShawn I* briefs; (3) discussed at the *LaShawn I* argument; and (4) explicitly referred to in the *LaShawn I* decision. In dissent, Judge Randolph stated that re-examining pendent jurisdiction violated the law-of-the-case doctrine. Judge Randolph also concluded that the *LaShawn I* panel's power to affirm on the basis of the D.C. claims was clear; that as a matter of discretion, the exercise of that power was appropriate; and that comity did not preclude the exercise of jurisdiction over D.C. law claims brought against the District. See Pet. App. 134a-49a.

4. *LaShawn II* -- En Banc Review. On rehearing *en banc*, the D.C. Circuit, by a 9-2 vote, reversed the panel decision on the ground that reopening the pendent jurisdiction ruling violated the law-of-the-case and law-of-the-circuit doctrines. The *en banc* court remitted the case to the panel for

consideration of the issues the District had raised in its second appeal. Pet. App. at 170a.

5. *LaShawn II* -- Final Disposition. After hearing the third oral argument of the second appeal, the panel affirmed Judge Hogan's order on remand in an unpublished order, rejecting the District's argument that the consent decree should be vacated because it exceeded the requirements of District law. The panel held that, because the District had earlier consented "to substantially the same decree," and the consent decree did "not extend beyond District law more than it extends beyond federal law, * * * the substitution of District law alone as the basis of the decree * * * did not materially undermine the District's consent." Pet. App. at 2a. The District again unsuccessfully sought rehearing and rehearing *en banc*.

D. CONSENT DECREE COMPLIANCE ISSUES

Throughout the appellate process, the District has been obligated to comply with the consent decree. As later rulings by Judge Hogan make clear, however, the District's record of compliance is barely distinguishable from its pre-litigation failure to follow federal and D.C. law. According to Judge Hogan, the petitioners' post-judgment actions were "marked by repeated cycles of noncompliance, * * * sluggish progress, frustration, * * * and further noncompliance * * *." See *LaShawn A.* v. *Kelly*, 887 F. Supp. 297, 299 (D.D.C. 1995). As a result, three years after entry of the consent decree, Judge Hogan appointed three limited receivers with circumscribed authority to implement changes in specific areas in which the District's non-compliance was particularly egregious and damaging to the class members. *Id.* at 300. Their efforts at change were met with "resistance and hostility." *Id.*

In May of 1995, nearly four years after entry of the agreed-upon remedial order, the district court determined that the

petitioners were "radically out of compliance with the Court's orders," *id.* at 313, including many of those provisions of the consent decree "voluntarily proposed by [petitioners]." *Id.* at 300. Adoption activity had "nearly ground to a halt," *id.*, and the critical shortage of social workers had not been corrected. *Id.* at 302. The District also continued to fail to provide basic administrative support to workers, *id.*, and had failed to take the steps necessary to maximize the receipt of available federal funds. Petitioners were also letting other available services go to waste. *Id.* at 308-09, 313.

The effects of this lack of compliance, the district court found, were tragic. One child was beaten and strangled to death despite the District's prior receipt of a report of neglect; the court-appointed monitor who reviewed the case said the child's death was "prevent[able]." *Id.* at 311. The district court also found that due to a severe shortage of foster care placements (despite many unprocessed applications from potential foster families), children were being shuttled from one emergency placement to another, depriving them of the continuity and security necessary for normal development. *Id.* at 312.

Based on these and other findings, the district court held the District in civil contempt, and ordered the imposition of a general receivership. The court explained that although it was "reluctan[t] to impose contempt sanctions and to interfere in the operations of local government by imposing broad receiverships or issuing flurries of micromanaging orders," *id.* at 317 (footnote omitted), the respondent children "face[d] great danger in the present system," and the District's "pattern of delay and inaction" had to come to an end. *Id.* The court ordered that the District and the plaintiffs, with the aid of a court-appointed monitor, work out the terms of implementation of the receivership. *Id.* at 316. The District has appealed this and a series of other orders regarding various aspects of the

limited and general receiverships to the D.C. Circuit, where these matters are pending.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE SET FORTH NO BASIS FOR A GRANT OF *CERTIORARI* ON THE ISSUE OF PENDENT JURISDICTION.

A. THE DECISION BELOW IS CONSISTENT WITH SETTLED PRINCIPLES GOVERNING PENDENT JURISDICTION.

It is well settled that pendent jurisdiction allows federal courts to adjudicate claims based on state or local law. This principle derives from this Court's decisions requiring a plaintiff "'to try his whole cause of action and his whole case at one time,'" thereby advancing judicial economy and avoiding piecemeal litigation. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 723 (1966), *quoting Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 320 (1927). *Gibbs* sets forth a two-part test for determining whether pendent jurisdiction exists and whether its exercise is appropriate. First, a federal court has the power to hear pendent claims when a substantial federal claim and a local law claim "derive from a common nucleus of operative fact." *Id.* at 725. A federal claim is "substantial" so long as it is not "'obviously frivolous'" or "'no longer open to discussion.'" *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted). Previous court decisions that make claims "'doubtful or questionable'" do not render them insubstantial for purposes of determining federal jurisdiction. *Id.* at 537-38 (citation omitted). As *Gibbs* explains, "[t]he question of power [to decide the state claims] will ordinarily be resolved on the pleadings." 383 U.S. at 727.

Under the second part of the *Gibbs* test, a federal court must determine whether to exercise pendent jurisdiction as a matter of judicial discretion, taking into consideration a number of factors relating to "judicial economy, convenience and fairness to litigants." *Id.* at 726. Thus, a federal court may decline to hear pendent claims when the federal claims are dismissed before trial, or when the state claims "substantially predominate." *Id.* at 726-27. On the other hand, the exercise of pendent jurisdiction is particularly appropriate when "substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970) (affirming entry of judgment on state claims even though federal claims dropped out upon entry of judgment notwithstanding the verdict for lack of adequate proof). In addition, pendent jurisdiction should be exercised to avoid a ruling on constitutional issues. *Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594, 594-95 (1982) (court abused its discretion by deciding constitutional issue when case could have been disposed of on state law grounds, even if state law issue was "a sensitive matter"); see also *Hagans*, 415 U.S. at 546-47 ("The doctrine is * * * recurringly applied, and, at the very least, it presumes the advisability of deciding first the pendent, nonconstitutional issue.") (citation and footnote omitted); *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 192-93 (1909).

Under these precepts, the *LaShawn I* panel appropriately affirmed Judge Hogan's liability ruling on the basis of D.C. law. The D.C. Circuit plainly had the power to consider the local law issues: the federal and D.C. claims derived from a common nucleus of operative fact and the federal statutory and constitutional claims were far more than "substantial" at the outset since plaintiffs prevailed on all of them after full trial; petitioners do not contend otherwise. Notwithstanding this Court's decision in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), the

overwhelming majority of plaintiffs' federal statutory claims remain viable, and *Suter* has no relevance at all to respondents' winning constitutional claims. See *infra* pp. 23- 26.[7] None of the multiple federal adjudications in this case has been reversed to this day.

The D.C. Circuit's decision to affirm on the basis of the D.C. law claims also finds strong support in this Court's teachings. First, affirming liability on the basis of local law allowed the D.C. Circuit to avoid resolving "complex constitutional and federal statutory issues in this case." Pet. App. at 92a. Second, the D.C. Circuit's ruling came only after the parties had expended substantial time and energy in resolving their dispute. The district court had shepherded the case through full discovery, a two-week trial, and the negotiation by the parties and subsequent approval by the court of a detailed consent decree. By the time *LaShawn I* was decided, the case had been pending for nearly four years. Finally, during the briefing of *LaShawn I*, petitioners never argued that they had not violated D.C. law or that *Gibbs* precludes the exercise of pendent jurisdiction; nor did petitioners challenge respondents' reading of local law until after the case was decided by the appellate court, at which point they had waived their right to contest liability under D.C. law. These factors plainly demonstrate that *LaShawn I* was correctly decided.

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[7]In fact, one of the cases cited by petitioners holds that even after *Suter*, federal claims parallel to those raised by respondents were still considered substantial enough to support entry of a consent decree. See *Angela R. ex rel. Hesselbein* v. *Clinton*, 999 F.2d 320, 324 (8th Cir. 1993) ("Because [*Suter*] does not 'inescapably render the [federal statutory] claims frivolous,' we think it clear that the district court had jurisdiction to approve the proposed settlement and to enter a consent decree * * * .") (citation omitted).

B. THE EXERCISE OF PENDENT JURISDICTION DOES NOT VIOLATE PRINCIPLES OF COMITY.

Ignoring the myriad factors supporting the D.C. Circuit's exercise of pendent jurisdiction, petitioners argue that out of deference to petitioners' status as local government officials, a federal court should not enter or enforce a consent decree unless the decree is explicitly based upon federal law.

By failing to present this argument to the D.C. Circuit in a timely manner, petitioners waived their right to do so in this Court. Petitioners never argued to the *LaShawn I* panel that under *Gibbs*, considerations of comity preclude the exercise of pendent jurisdiction over local law claims against a municipality. By the time petitioners raised the argument in *LaShawn II*, it was too late, as the *en banc* court held that the pendent jurisdiction issue should not be revisited. Arguments not properly raised and addressed in the lower courts provide no basis for *certiorari*. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982).

In any event, petitioners' appeal to comity as a trump card is without basis in law. It is true that this Court held in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"), that a federal court may not hear pendent claims for injunctive relief against states based on state law. But that holding was grounded in the Eleventh Amendment, and in the notion that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Monaco* v. *Mississippi*, 292 U.S. 313, 322-23 (1934) (citation omitted). As this Court has often repeated, however, "States are protected by the Eleventh Amendment while municipalities are not." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

Petitioners' attempt to extend *Pennhurst II* to municipalities is particularly inappropriate here, given that the District of Columbia is not a creation of state government, but rather is a wholly federal entity. U.S. Const. art I, § 8. Thus, federal court action with regard to the District presents none of the federalism concerns that lie at the heart of *Pennhurst II*. Indeed, while Congress has granted the District limited home rule, see District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973),[8] the District's own judicial system has remained an essentially federal operation. See *id.* at § 602(a)(4) (District government may not amend portions of D.C. code dealing with the organization and jurisdiction of D.C. courts); § 445 (District government has no control over budget of D.C. courts); § 433(a) (D.C. judges appointed by the President with the advice and consent of the Senate).

Accordingly, as Judge Randolph recognized in his dissent from the initial panel decision in *LaShawn II*, comity towards municipalities -- however important that concern might be ordinarily -- should not preclude the exercise of pendent jurisdiction over local law claims against a "distinctly federal entity." Pet. App. at 148a ("A suit in federal court against a federal entity 'is hardly the instrument of a distant, disconnected sovereign,' and thus raises none of the concerns that underpin the Eleventh Amendment or the Supreme Court's application of it in *Pennhurst II*.") *Id.* (*quoting Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41 (1994)).

None of the cases cited by petitioners (Petition at 19-21) (hereinafter "Pet.") suggests that the exercise of pendent

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[8]But see District of Columbia Financial Responsibility and Management Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (1996) (temporarily revoking certain home rule authority).

jurisdiction was inappropriate here. In fact, to the extent these cases are relevant, the district court has properly followed this Court's guidance. *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977), cautioned that a federal court remedy must "take into account the interests of state and local authorities in managing their own affairs." *Missouri* v. *Jenkins*, 495 U.S. 33, 52 (1990), similarly counseled that district courts should, in enforcing consent decrees against state and local authorities, allow them the greatest "opportunity to devise their own solutions" to institutional violations. See also *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) (same).[9] Judge Hogan unquestionably followed these precepts. Rather than dictate the terms of an injunction, he invited the parties to negotiate a remedy, and entered their agreed decree which provided for the District's continued management of the child welfare system. Judge Hogan resisted requests for the appointment of a receiver for nearly four years, until it became painfully clear that the District was making no progress towards compliance.

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[9]Petitioners' reliance on this Court's rulings in cases involving issues of child custody is similarly misplaced. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 704 (1992), recognized an exception to federal diversity jurisdiction encompassing "only cases involving the issuance of a divorce, alimony, or child-custody decree." *Moore* v. *Sims*, 442 U.S. 415, 425 (1979), held that abstention is appropriate where a party to a pending child custody proceeding in state court seeks to collaterally attack the constitutionality of a state statute in federal court. Nothing remotely similar is present herein. Moreover, citation of *Moore* v. *Sims* is not adequate to raise the issue of abstention in the current petition, which does not properly present the issue for review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535-36 (1992); Sup. Ct. R. 14.1.(a).

C. NO CONFLICT AMONG THE CIRCUITS EXISTS.

Contrary to petitioners' suggestion, the D.C. Circuit's decision does not conflict with the federal court of appeals cases cited by petitioners, none of which even discusses the exercise of pendent jurisdiction. Three of the cases petitioners cite discuss modification of a consent decree when there is a change in the law that formed the basis for the decree. See *Evans* v. *City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994)[10]; *Sweeton* v. *Brown*, 27 F.3d 1162, 1165 (6th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1118 (1995); *Alexander* v. *Britt*, 89 F.3d 194, 200 (4th Cir. 1996). In *Angela R. ex rel. Hesselbein* v. *Clinton*, 999 F.2d 320 (8th Cir. 1993),[11] the court considered whether the enforcement provisions of a consent decree against state

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[10]The plurality in *Evans* stated in *dicta* that "principles of respect for a coordinate sovereign (and in some cases the eleventh amendment) mean that federal courts should refrain from adjudicating claims under state law, whether raised directly or whether used as the springboards for other theories." 10 F.3d at 481. The plurality was not declaring an end to pendent jurisdiction over claims against municipalities based on local law; rather, the opinion merely rejected the plaintiffs' 14th Amendment due process claim based on a violation of state law.

[11]The court in *Angela R.* stated in *dicta* that "expending significant federal judicial resources enforcing consent decree provisions that concern only issues of state law is rarely justifiable." *Angela R.*, 999 F.2d at 326. The court was referring not to state law issues under which the case arose, however, but consent decree provisions that had subsequently been enacted into law. In the instant case, the federal court found rampant violations of parallel federal and local statutory provisions; these findings were never reversed or vacated; the District never contested the violations; and the provisions of the consent decree all are required by, or designed to remedy the violation of, the law under which the claims arose.

officials were sufficiently specific to support approval of the decree. Another court of appeals case petitioners cite dealt with the enforceability of a provision included in a settlement agreement that was agreed to by the state, but was not related to remedying the violation of the law under which the case arose. *Saahir* v. *Estelle*, 47 F.3d 758, 761 (5th Cir. 1995).[12]

D. PETITIONERS' COMPLAINTS ABOUT LOCAL-LAW RULINGS DO NOT SUPPORT THEIR PETITION.

In a futile attempt to buttress their argument that the exercise of pendent jurisdiction was inappropriate, petitioners suggest that the federal courts have impinged on the jurisdiction of the local courts and have misinterpreted District law. Pet. at 27-29. These claims do not warrant a grant of *certiorari*; in fact, they are meritless.

1. The consent decree in no way interferes with the exclusive jurisdiction of neglect and adoption proceedings vested in the D.C. Superior Court. This class action is not a neglect or custody case. Rather, the consent decree aims at systemic reform of the District's woefully inadequate child-welfare system. The *LaShawn I* panel said just that, when it decided that *Younger* abstention was not required because proceedings in the Family Division are not an appropriate forum for resolving the respondent children's claims. Pet. App. at 87a-

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[12]Cases cited by petitioners involving federal court abstention or failure to exhaust state remedies when state court custody proceedings are pending or available, *Bergstrom* v. *Bergstrom*, 623 F.2d 517 (8th Cir. 1980); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625 (6th cir. 1978), likewise are not in conflict with the decision below, because the Family Division of the D.C. Superior Court is not the appropriate forum for resolving the claims presented in this case, as the D.C. Circuit found. Pet. App. at 87a-92a.

92a.[13] Petitioners apparently have accepted this point because they do not seek *certiorari* on the *Younger* issue.

2. The federal courts have not misinterpreted the Youth Residential Facilities Licensure Act of 1986 (the "Act"). The appeals court did not rule on the issue of notice because petitioners never raised that issue in the district court or on appeal until they sought rehearing in *LaShawn I*. In any event, the District's reliance on the Act's notice provision is misplaced. As noted in *Campbell* v. *District of Columbia*, 568 A.2d 1076, 1098 (D.C. 1990), the purpose of such a notice provision is to allow the Mayor to investigate and remedy individual claims prior to the filing of a lawsuit to avoid unnecessary litigation. Here, it is inconceivable that the Mayor could have, with *five-days'* notice, remedied the systemic violations of the Act identified by respondents. Indeed, the District was unable, during the first *four years* after the entry of the consent decree, to remedy its numerous violations of the Act. See *LaShawn A.*, 887 F. Supp. at 306-07.

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[13]Systemic illegalities pervading the entirety of a child welfare system and affecting an entire class of children, such as those Judge Hogan found here on an extensive factual record, cannot be addressed within the narrowly circumscribed parameters of an individual child's abuse or neglect proceeding in the Family Division. For this reason, abstention has been consistently rejected in class action injunctive litigation regarding child welfare systems. See, *e.g.*, *Marisol A. ex rel. Forbes* v. *Giuliani*, 929 F. Supp. 662, 687-89 (S.D.N.Y. 1996); *Wilder* v. *Bernstein*, 645 F. Supp. 1292, 1339 n.37 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); *Joseph A. ex rel. Wolfe* v. *New Mexico Dep't of Human Services*, 575 F. Supp. 346, 350 (D.N.M. 1983); see also *Timmy S.* v. *Stumbo*, 537 F. Supp. 39, 46 (E.D. Ky. 1981) (rejecting abstention in individual-child case under federal Adoption Assistance Act).

3. The *LaShawn I* panel's reliance on *Turner* v. *District of Columbia*, 532 A.2d 662 (D.C. 1987), to support injunctive relief against the District was not, as petitioners suggest, inappropriate. Pet. at 27-28. Having never timely advised the D.C. Circuit of this view, petitioners have waived this argument. In any event, it is well established that violations of District law by the District government can be remedied by injunctive relief. See, *e.g.*, *Kelly* v. *Parents United*, 641 A.2d 159, 165 (D.C. 1994) (affirming permanent injunction against the District designed to remedy violations of a D.C. statute). See also *Hessey* v. *Burden*, 615 A.2d 562, 571 (D.C. 1992) (citing cases). Thus, the *LaShawn I* panel did not decide a "novel" issue of District law when it concluded that the violations of D.C. law could support the remedial decree.[14]

4. Contrary to the District's assertion, the consent decree is not based on the premise that an unpublished internal agency operating manual constitutes District law. Pet. at 28. Rather, Judge Hogan carefully distinguished between binding D.C. law and the Child and Family Services Division's Manual of Operations (the "Manual"). See Pet. App. at 21a-22a (distinguishing between D.C. law and the Manual which

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[14]Petitioners' reliance on the D.C. Circuit's ruling in *Women Prisoners of the D.C. Dep't of Corrections* v. *District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 65 U.S.L.W. 3727 (U.S. Apr. 29,1997), is unavailing. The D.C. Court of Appeals, not the D.C. Circuit, is the final arbiter on matters of D.C. law. See *Lindler* v. *District of Columbia*, 502 F.2d 495, 498 n.4 (D.C. Cir. 1974). And, as noted in the text above, the D.C. Court of Appeals has clearly endorsed equitable remedies for violations of D.C. law by the District government. Moreover, any inconsistency between two decisions in the D.C. Circuit regarding the interpretation of D.C. law can be resolved by the Circuit or by the D.C. Court of Appeals, and does not require the intervention of this Court.

expressed "policy"). Judge Hogan merely noted that one provision of the Manual paralleled a requirement of federal law, and that other subsections provided more specific guidelines regarding the implementation of general requirements of relevant D.C. statutes. See, *e.g.*, Pet. App. at 8a-10a. The court's reference to these provisions in no way suggests that the Court improperly accorded the Manual the status of law.

5. Finally, the District disputes the merits of various orders issued by Judge Hogan under the consent decree.[15] Pet. at 28. But these complaints neither support a jurisdictional challenge to the consent decree, nor provide any reason to grant *certiorari*. Indeed, a grant of *certiorari* to consider any such issue would be premature, since these issues are now the subject of several appeals to the D.C. Circuit.[16]

II. THE CONSENT DECREE IS FOUNDED ON SUBSTANTIAL FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS.

Certiorari is not appropriate for the additional reason that, notwithstanding the *LaShawn I* panel's decision to affirm liability based on D.C. law, the consent decree is still supported by numerous violations of respondents' federal constitutional

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[15]The District is particularly indignant about Judge Hogan's appointment of a general receiver. See Pet. at 29. But, as noted above, the district court only reluctantly appointed a general receiver four years after entry of the consent decree, after the more modest step of limited receiverships proved ineffective, due to the District's recalcitrance, and when it was clear that the District was making no progress towards compliance with the decree and that children were in danger. See *LaShawn A.*, 887 F. Supp. at 298.

[16]All of those appeals are being held in abeyance, pursuant to the District's requests, pending this Court's resolution of the Petition.

and statutory rights. Judge Hogan based liability on violations of multiple provisions of several federal statutes and the constitutional rights of the respondent foster children.

Judge Hogan's ruling on the constitutional issue was sound. The district judge relied on *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), and this Court's analysis of *Youngberg* in *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), to properly conclude that children placed in foster care custody by the District, like involuntarily committed mental patients, have a Due Process right to "reasonably safe placements in which they will not be harmed." Pet. App. at 71a.[17]

Petitioners suggest that *Suter* v. *Artist M.*, 503 U.S. 347 (1992), undermines the children's federal statutory claims, but they overread that decision. *Suter's* holding that 42 U.S.C. § 671(a)(15) is not enforceable under 42 U.S.C. § 1983 rested on the vagueness of the "reasonable efforts" language in that statutory subsection.[18]

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[17]The District incorrectly asserts that the *LaShawn I* panel implicitly ruled that respondents' constitutional claims were insubstantial and that Judge Hogan failed to find facts sufficient to support a Due Process violation. Pet. at 9 n.6. First, the D.C. Circuit never ruled on the constitutional claims. See Pet. App. at 92a ("It is not necessary to reach the complex constitutional and federal statutory issues in this case."). Second, Judge Hogan expressly found that the District had "failed to protect [] plaintiffs from harm -- whether physical, psychological, or emotional -- by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things." Pet. App. at 78a.

[18]This is apparent from the fact that the Court in *Suter* (continued...)

The single statutory subsection at issue in *Suter* was only one of numerous federal statutes on which Judge Hogan based liability.[19] For example, Judge Hogan found that the District had violated federal statutory mandates requiring the District:

-- to maintain a written "case plan" "(as defined in [42 U.S.C. § 675(5)(A)] * * *) for each child receiving foster care," 42 U.S.C. §§ 622(b)(9)(B)(ii) & 671(a)(16);

-- to assure that "the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review," 42 U.S.C. § 675(5)(B); and

-- to hold -- "no later than eighteen months after the original placement" of a child -- a "dispositional hearing" at which "the future status of the child (including, but not limited to, whether

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[18](...continued)
distinguished -- rather than overruling -- *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (which held that the "reasonable rates" requirement of the state-plan provision of the Medicaid Act created rights enforceable under § 1983), explaining that the Medicaid Act and its regulations "set forth in some detail the factors to be considered in determining the methods for calculating rates." *503 U.S. at 360.* See also *Blessing* v. *Freestone*, 65 U.S.L.W. 4265, 4268 (U.S. Apr. 21, 1997) (conducting *Wilder* analysis); *White ex rel. White* v. *Chambliss*, 1997 U.S. App. LEXIS 9288, at *21 n.4 (4th Cir. Apr. 30, 1997) ("*Suter* itself was not a novel holding, but rather rested upon settled legal principles * * * .").

[19]The reach of *Suter*, which involved this Court's evaluation of congressional intent, was subsequently limited by Congress to the one statutory subsection at issue therein. See 42 U.S.C. § 1320a-2 (codified as amended Oct. 20, 1994); 42 U.S.C. § 1320a-10 (codified as amended Oct. 31, 1994) (second enactment of same statutory language).

the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) * * *." 42 U.S.C. § 675(5)(C); see also § 42 U.S.C. § 622(b)(9)(B)(ii) incorporating by reference 42 U.S.C. § 675(5)(C).[20]

These provisions are specific enough to be enforceable under 42 U.S.C. § 1983. Thus, contrary to the District's claims, with the single exception of § 671(a)(15), *Suter* does not implicate the numerous federal statutory provisions on which -- in addition to constitutional and local law -- petitioners' liability was originally based.[21]

The strength of these federal statutory and constitutional claims provides ample grounds for the Court to deny *certiorari*. Even if the Court had concerns about the exercise of pendent jurisdiction here, liability would remain independently

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[20]See also Pet. App. at 153a n.13 (Randolph, J., dissenting) (listing eight separate federal statutory adjudications).

[21]See *Marisol A.*, 929 F. Supp. at 682-84 (holding that, notwithstanding *Suter*, §§ 627 (now § 622), 671(a)(10) & (16), and 5106a(b)(2) are enforceable under § 1983); *Jeanine B. ex rel. Blondis* v. *Thompson*, 877 F. Supp. 1268, 1281-86 (E.D. Wis. 1995) (sustaining claims under the same multiple statutory sections as plaintiffs herein prevailed upon, with single exception of 42 U.S.C. § 671(a)(15)). But see *Doe ex rel. Fein* v. *District of Columbia*, 93 F.3d 861, 867 (D.C. Cir. 1996) (§ 5106a(b)(2) not enforceable under § 1983); *Tony L.* v. *Childers*, 71 F.3d 1182, 1189 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1834 (1996) (same); *White*, 1997 U.S. App. LEXIS at *21 (§ 671(a)(10) not enforceable under § 1983). *Doe*, *Tony L.*, and *White* all involved individual plaintiffs seeking money damages.

supported by the numerous federal adjudications. Petitioners would therefore still be bound by the terms of the consent decree.[22]

III. THE SIGNIFICANCE OF THIS CASE IS FURTHER DIMINISHED BECAUSE THE ISSUE OF PENDENT JURISDICTION IS NOW GOVERNED BY STATUTE.

This Court would have to substantially rewrite the *Gibbs* doctrine in order to achieve the result petitioners desire. For the reasons discussed above, compelling arguments favor allowing the judgment of the court below to stand and declining petitioners' invitation to make comity towards municipalities into a singular overriding factor barring the exercise of pendent jurisdiction over the District of Columbia.

A grant of *certiorari* would be inappropriate for the additional reason that pendent jurisdiction (renamed "supplemental jurisdiction") is now governed by federal statute. See 28 U.S.C. § 1367 (text reprinted in Appendix). Section 1367 is not decisive here because it applies only to cases filed after December 1, 1990. *Id.*

The scope of this federal statute in light of pre-existing law is not yet settled. Several courts and commentators have concluded that § 1367 changes the *Gibbs* doctrine by restricting the court's discretion to decline to exercise supplemental

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[22]While the end result would be clear, however, the proceedings on remand would likely include extensive additional briefing and argument in the district court, followed by additional appeals, in a case in which liability was established on the basis of an overwhelming factual record in 1991, and there already have been protracted appellate proceedings.

jurisdiction. See *Executive Software North America, Inc.* v. *U.S. District Court*, 24 F.3d 1545, 1552 (9th Cir. 1994) (§ 1367 "channels the district court's discretion to identify new grounds for declining jurisdiction more particularly than the preexisting doctrine"); *McLaurin* v. *Prater*, 30 F.3d 982, 985 (8th Cir. 1994) ("in the absence of the circumstances described in subsections (b) and (c), § 1367(a) requires the district court to accept supplemental jurisdiction * * *.").[23] On the other hand, some courts have suggested that § 1367 was meant to codify the *Gibbs* doctrine.[24]

Whether or not the statute changes the law of pendent jurisdiction, it makes a grant of *certiorari* in this case inappropriate. If the statute modifies the *Gibbs* doctrine, then the importance of this case is plainly diminished. If the statute codifies *Gibbs*, then the statute makes clear that the *Gibbs* doctrine gives the federal courts the discretion to exercise pendent jurisdiction in this case. The statute commands the federal courts to exercise jurisdiction over local law claims, except in certain exceptional circumstances when district courts are permitted -- not compelled -- to decline to exercise that

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[23]See also *Palmer* v. *Hospital Auth.*, 22 F.3d 1559, 1563 (11th Cir. 1994) (the "scope [of § 1367] is somewhat different than the *Gibbs* tests"); 13B Charles Alan Wright *et al.*, Federal Practice and Procedure § 3567.1 at 24 (Supp. 1996) (describing Ninth Circuit's analysis of § 1367(c) and how it relates to prior case law as "persuasive"); 16 Robert C. Casad *et al.* Moore's Federal Practice § 106.61 at 106-78 (3d ed. 1997) ("A district court no longer possesses discretion to refuse to exercise supplemental jurisdiction on grounds not enumerated in the statute.").

[24]See *Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993) (legislative history indicates an intent to codify prior law); *Borough of West Mifflin* v. *Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (same).

power. See 28 U.S.C. § 1367(a) (district courts "shall have supplemental jurisdiction over all other claims," except as otherwise provided); *id.* at § 1367(c) (enumerating circumstances in which district court "may" decline to exercise supplemental jurisdiction). The statute certainly does not require federal courts to decline to exercise jurisdiction over local law claims simply because the defendant is a municipality. Thus the statute either (1) codifies and expands the pre-existing doctrine supporting the exercise of pendent jurisdiction herein, or (2) wholly supplants that doctrine, rendering a decision herein inapplicable to future cases. Either way, a decision in this case would be both exceedingly fact-specific and doctrinally anachronistic.

IV. THE DISTRICT IS BOUND BY ITS AGREEMENT TO THE CONSENT DECREE.

The second issue petitioners present -- whether the consent decree should have been vacated because it exceeds the requirements of District law -- does not merit this Court's review. The District negotiated and consented to be bound by a decree that exceeded the requirements of federal law (and, necessarily, the parallel requirements of D.C. law). The decree as slightly modified by Judge Hogan on remand did not extend beyond District law any more than it extended beyond federal law. Accordingly, following *en banc* review, the *LaShawn II* panel correctly held that "the substitution of District law alone as the basis of the decree, in place of reliance on federal plus District law, did not materially undermine the District's consent." Pet. App. at 1a-2a. The District does not attempt to demonstrate that the decree does in fact extend beyond District law more than it extends beyond federal law. In agreeing to the terms of a settlement or remedial decree, a municipality is perfectly capable of agreeing to do more than the law absolutely requires in order to remedy the legal violation. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). The District

did just that in this case, and its later regret does not provide a worthy basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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APPENDIX

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

(e) As used in this section, the term "State" includes the District of Columbia * * *.

(6)

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MARION S. BARRY, JR., *et al.*,
Petitioners,
v.
LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The opposition is replete with errors, so many in number that this reply can address only a few of them. These errors should not be permitted to obscure the two central issues in this case or the character of this litigation.

First, the D.C. Circuit has ruled that a federal court may "reform" local government institutions, and displace and otherwise interfere with the legitimate activities of a municipality's executive, legislative, and judicial branches, without *any federal basis*. The D.C. Circuit has also ruled that a federal court may engage in such "reform" without a definitive determination that there is *any legal basis* for federal-court administration of municipal affairs. These rulings are not faithful to the decisions of this Court, including *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), and conflict with the decisions of other Circuits.

Second, this is not a case that vindicates individual rights. Instead, it displaces the policy and legal judgments Congress has entrusted to the District's local institutions and to a federal agency. At trial, respondents merely established that its child-welfare system is flawed. They did not establish that these flaws violate rights guaranteed by the Constitution, federal child-welfare legislation, or local child-welfare law. Accordingly, the judgment in this case flatly contradicts *Blessing v. Freestone*, 65 U.S.L.W. 4265 (U.S. April 22, 1997). Respondents sought the assistance of the federal judi-

ciary to compel the District to hire more staff, improve its data processing systems, secure more federal monies, alter policy decisions governing children in the District's foster-care system, and the like. Their efforts should have been directed to the Council of the District of Columbia, its Mayor, and the Family Division of the Superior Court. The massive injunction they succeeded in securing is not legally supportable.

ARGUMENT

I. THE EXERCISE OF PENDENT JURISDICTION HERE CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Respondents attempt to portray the D.C. Circuit's exercise of pendent jurisdiction here as a run-of-the-mill exercise of federal judicial power that is perfectly consistent with the decisions of this Court and the other Circuits. They do so even as they acknowledge three important principles that completely undercut their position: (1) the exercise of pendent jurisdiction is disfavored "when . . . state claims 'substantially predominate'" (Opp. 13); (2) "federalism concerns . . . lie at the heart of *Pennhurst II*,"[1/] (Opp. 16), not simply the language of the Eleventh Amendment; and (3) "The D.C. Court of Appeals, not the D.C. Circuit, is the final arbiter on matters of D.C. law." Opp. 21 n.14. These principles plainly cannot justify the D.C. Circuit's actions here -- to eschew federal law and base a sweeping injunction reforming local government solely on its understanding of local law; to invoke local law to displace, and otherwise interfere with, the policy and legal judgments Congress has assigned to the District's legislative, executive, and judicial branches; and to

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[1/] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

embark on a foray into areas of local law that have not yet been charted by the District's highest court.

Furthermore, the D.C. Circuit, although citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), failed to follow it. First, the *LaShawn I* panel itself exercised pendent jurisdiction, without finding that the trial court's decision not to do so constituted legal error or an abuse of discretion. Second, contrary to respondents' suggestion that the panel considered the "myriad" factors set forth in *Gibbs* (Opp. 15), the panel ruled that it was free to exercise pendent jurisdiction simply in order to avoid what it stated were complex constitutional and federal statutory issues. Thus, the panel never considered that a federal court that seeks to reform local government institutions based on its interpretation of local law undermines important principles of democracy and federalism.[2/] In addition, fairness to the parties and judicial economy are not served by permitting respondents to litigate in two fora -- federal and local -- any local-law claims they may have. Concomitantly, the policy that disfavors requiring plaintiffs to split federal and local causes of action between federal and local courts does not support the D.C. Circuit's actions here because most respondents were parties to proceedings in the Family Division of the Superior Court when this federal action was brought. Respondents could and should have asserted their federal claims in that forum.

[2/]Insofar as the District is concerned, these principles are reflected in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), and the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970). Given these measures, respondents' suggestion (Opp. 16) that federalism concerns are not present here because the District's judicial system has some federal aspects to it (*e.g.*, its judges are appointed by the President) is absurd. *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

II. THE DISTRICT OF COLUMBIA DID NOT WAIVE ITS OBJECTION TO THE EXERCISE OF PENDENT JURISDICTION.

Respondents argue, as they have in the past without success, that the District waived any right to object to the exercise of pendent jurisdiction. The District did not.

First, as respondents now concede, the trial court's liability decision in this case found only federal liability. In its first appeal, the District urged that all these federal liability rulings were wrong. Respondents countered that the *LaShawn I* panel should affirm because the trial court had exercised pendent jurisdiction and found local-law violations. They did not argue in the alternative that, if the trial court had declined to exercise pendent jurisdiction, that decision was erroneous under *Gibbs*. Indeed, their brief never cited *Gibbs*. In reply, the District urged that their argument was based on the false premise that the trial court had exercised pendent jurisdiction and it also urged that any local-law claims belonged in the courts of the District of Columbia.[3/] It urged, in short, that

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[3/]The District's Reply Brief 7-8 (Sept. 16, 1992) stated:

> *Judge Hogan did not decide any pendent District-law claims.* Instead, the only legal significance he attached to his discussion of District . . . law was that it creates liberty interests protected by the Due Process Clause of the Fifth Amendment. . . .
>
> *As a consequence, this Court should not decline to resolve the federal statutory claims on the grounds that it can affirm on pendent District-law claims.* . . . [W]hat appellees are seeking here is a judgment, not made below, that rests solely on District of Columbia law and DHS's internal operating manual, ***matters that plainly belong not in a federal court but in the courts of the District of Columbia.*** [Emphasis added.]

the *LaShawn I* panel should not overturn the trial court's judgment not to exercise pendent jurisdiction.

The debate over whether the trial court had exercised pendent jurisdiction continued at oral argument. Counsel for the District stated unequivocally that it had not done so and also urged that its refusal was correct because the highest court of the District of Columbia has never held that the District's child-welfare law is specifically enforceable. Transcript of Oral Argument 36 (Nov. 4, 1992) ("This is a local law issue. And it is a case of first impression and should be decided by the local Courts"); *see also id.* 4-10, 17-19, 34-36.

The *LaShawn I* panel rejected respondents' argument that the trial court had decided local-law claims in their favor. App. 84a-97a. Nevertheless, it excused their waiver of the argument that the trial court had erred in not exercising pendent jurisdiction; ruled that it appeared that local-law violations could sustain the remedial decree; and remanded for that purpose. App. 92a-97a. The fact that *LaShawn I* excused *respondents' waiver*, however, does not mean that the District was obligated to defend the trial court's decision not to exercise pendent jurisdiction or to repel an attack never made by respondents. In fact, of course, the District did so in its Reply Brief and at oral argument, and *LaShawn I* never suggested, and properly so, that the District had waived the argument that the trial court's decision not to exercise pendent jurisdiction was correct.

Second, because a federal court's power to reform local government institutions based on its interpretation of local law is limited, if it exists at all, and because the exercise of such power intrudes upon important democratic and federalism principles that override considerations of plaintiffs' convenience, a local government should not be deemed to have waived an objection to the exercise of such power unless such a waiver is absolutely clear. *Cf. Port Authority Trans-Hudson*

Corp. v. Feeney, 495 U.S. 299, 305-06 (1990) (in determining whether a state has waived its 11th Amendment immunity, a particularly strict standard applies: a waiver will be given effect only where it is stated by the most express language or by such overwhelming implication that there is no room for any other reasonable construction).

Third, a federal appellate court should not rule that a trial court has abused its discretion unless, in fact, it did so. Thus, even if respondents had urged that the trial court had abused its discretion in not exercising pendent jurisdiction and even if the District had agreed, the *LaShawn I* court nevertheless would have been obliged to determine for itself whether the trial court had erred. A federal appellate court certainly should not reverse a trial court's considered judgment on such an important matter based merely on the parties' say-so.

Finally, Congress has conferred exclusive subject matter jurisdiction of neglect and adoption proceedings on the Family Division of the Superior Court. D.C. Code § 11-1101(9) & (13) (1995 repl.). Congress has thus precluded a federal court from entertaining local-law neglect and adoption claims, a matter that requires judicial inquiry at all stages of the litigation. *See, e.g., Arizonans for Official English v. Arizona, supra*, 117 S. Ct. at 1071 (this Court is not "disarmed" by parties' acquiescence in "core matters of federal-court adjudicatory authority," and it has an obligation "to consider . . . the authority of the lower courts to proceed").

In short, the District is entitled to raise the argument that a federal court does not have the power to entertain local-law claims by children who are under the protective wing of the Family Division. When the Family Division, after considering the views of all interested persons, has concluded that a particular placement is in a child's best interest and has imposed on the District obligations to implement and effectuate that placement, a federal court does not have the power,

based on its understanding of local law, to entertain the same matters or to reform municipal institutions to advance them.[4/]

III. THE DISTRICT DID NOT CONSENT TO ANY REMEDIAL ORDER PURPORTEDLY BASED ON LOCAL LAW.

The District agreed to the remedial order in this case only after litigating liability and only after the trial court made sweeping findings of federal liability, findings which made it readily apparent that the trial court intended to order broad relief.[5/] And, the District reserved the right to appeal the trial court's liability decision. The District's agreement on remedy was, therefore, a "knuckling under to the inevitable," not a settlement of a case pursuant to a consent decree in which the parties resolve their disputes without burdensome litigation and determinations of fault. *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1338 (7th Cir. 1992).

[4/]Here, for example, respondents, citing only the decision of the trial court, mistakenly claim that "[c]ontrary to the District's assertion, the consent [sic] decree is not based on the premise that an unpublished internal agency operating manual constitutes District law." Opp. 21. However, this is precisely the premise of the D.C. Circuit's *LaShawn I* decision. See App. 92a-93a, 95a-96a. And the court so ruled even though counsel for both sides advised that the unpublished manual has no legal effect. Thus, when asked by the court, "Do you agree [with the District that] the manual of operations is not law?", counsel for respondents, Ms. Lowry, answered: "I agree that it is not. It does not have the effect of law in the District of Columbia . . .." Transcript of Oral Argument 23 (Nov. 4, 1992).

[5/]For example, the decree reflected the trial court's ruling that the plan requirements of the federal Adoption Assistance Act, including its seemingly expansive "reasonable efforts" clause created rights, a ruling subsequently invalidated by this Court. *See supra* at 10.

Negotiated remedial agreements are construed according to principles of contract law in which the intent of the parties, as expressed in the agreement, governs enforceability. *See, e.g.*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). Here, the parties' intent in accepting the remedial order is clear. The bargain the parties struck, with the approval of the court, was that the District agreed to sweeping institutional reform based on the assumption -- to be challenged on appeal -- that the trial court's federal liability rulings were correct; in exchange, plaintiffs agreed that the remedial order would be null and void to the extent that those federal liability findings did not survive that appeal.

LaShawn I did not affirm *any* federal liability. Its decision to invoke pendent jurisdiction and to conditionally find liability based on local law does not alter this conclusion. The federal liability rulings plainly did not survive the appeal and thus the remedial decree based on those rulings was rendered null and void.[6/]

[6/]The distinction between federal and local liability is important. When local law and officials violate the Constitution and federal statutes, local law and officials must yield to that higher authority. Furthermore, federal courts have broad, but not unlimited, equitable power to remedy violations of federal rights, including the power to override local law and to direct the actions of local officials.

Here, for example, the District accepted, pending its appeal, the trial court's ruling that the internal operating manual of its child-welfare agency created liberty interests under the Due Process Clause of the Fifth Amendment. By contrast, this comprehensive and detailed manual, which sets forth how the agency should ideally operate, unquestionably has no legal effect under District law. *See supra* at 7 n.4.

IV. THE DISTRICT HAS NOT VIOLATED RIGHTS.

Respondents have elected to defend the merits of their case although the D.C. Circuit, at their urging, has refused to reach them. Their arguments, however, serve only to underscore why it is important for a federal court to (1) find a federal basis before reconstituting a local government and (2) limit itself to redressing violations of federal rights.

Thus, for example, respondents argue that "[n]one of the multiple federal adjudications *in this case* has been reversed to this day" and "the overwhelming majority of respondents' federal statutory claims remain viable." Opp. 14, 13-14 (emphasis added). The first point is literally correct, but only because the D.C. Circuit has never reviewed the merits of their federal claims. The second point is not true. Both federal statutes relied on by the trial court have been definitively found not to create rights under 42 U.S.C. § 1983. *See Suter v. Artist M.*, 503 U.S. 347 (1992) (federal Adoption Assistance Act); *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) (federal Child Abuse Prevention and Treatment Act). Nevertheless, respondents maintain here that the exact provision at issue in *Doe* is enforceable (see Opp. 3 & 5). In the case of respondents' constitutional claims, the D.C. Circuit has strongly suggested that they are insubstantial. In *LaShawn I*, the D.C. Circuit directed the trial court to reconsider only its federal statutory rulings should it conclude that the remedial order could not be upheld solely on local-law grounds and did not authorize the trial court to reconsider its constitutional rulings, even if necessary to support the decree.

Respondents make similar errors in analyzing District law. Thus, while ignoring Congress' grant of exclusive jurisdiction to the Family Division in neglect and adoption proceedings and disclaiming that this litigation has any impact on the Division, respondents, in support of their argument that the District violated local law, cite several local-law provi-

sions that are entrusted to Family Division oversight. See Opp. 3-4 (case plans, services to enable children to be returned home, adoption). Indeed, they even cite D.C. Code § 16-2323(b), which governs Family Division review of dispositional orders! Opp. 4. Respondents also cite (Opp. 4) a general provision authorizing the District's Department of Human Services ("DHS") which cannot possibly be construed to create rights.[7] *See, e.g., Blessing v. Freestone, supra.*

CONCLUSION

The D.C. Circuit has ruled that a federal court has no obligation to ensure that there is any legal basis for an injunction displacing, and interfering with, the functions of a municipality's legislative, executive, and judicial branches. This is a ruling that deserves review by this Court.

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[7] D.C. Code § 6-2122(c) (1995 repl.) states: DHS "shall have sufficient staff, supervisory personnel, and resources to accomplish the purposes of this act, including the capacity to provide emergency and continuing service resources to abused and neglected children and their families."